Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

GARY L. BRADLEY, JAMES D. GRESSETT, AND
CIRCLE C DEVELOPMENT CORPORATION

Petitioners,

v.

FIRST GIBRALTAR BANK, FSB AND
FEDERAL DEPOSIT INSURANCE CORPORATION,
AS RECEIVER FOR
GIBRALTAR SAVINGS ASSOCIATION

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ROBIN C. GIBBS
GIBBS & BRUNS, L.L.P.
1100 Louisiana Street #5300
Houston, Texas 77002
(713) 650-8805
(713) 750-0903 (fax)
Counsel of Record

Of Counsel:
PHILLIP T. BRUNS
PAUL J. DOBROWSKI
BARRETT H. REASONER
JENNIFER HORAN GREER

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QUESTIONS PRESENTED

1. Whether the court of appeals opinion conflicts with the law of this Court and other circuits in implicitly holding that the FDIC, as an intervenor, did not have to meet independently the requirements for federal jurisdiction under Article III of the Constitution.

2. Whether the law of this Court and other circuits compels the conclusion that intervenors must independently satisfy the requirements for federal jurisdiction under Article III, including the requirement that plaintiffs' claims must present a "case" or "controversy" "arising under" federal law.

3. Whether the law of this Court and other circuits compels the conclusion that the FDIC's intervention presents no "case" or "controversy" under Article III, such that the FDIC does not have standing to sue in federal court, where the FDIC's plea in intervention asserted no claims on the FDIC's behalf, but instead sought only a declaratory judgment that would support its assignee's alleged right to recover on notes against Defendants and to avoid defenses asserted by the Defendants.

4. Whether the law of this Court and other circuits compels the conclusion that the FDIC's intervention into this purely state-law case does not cause this case to "aris[e] under" federal law under Article III, where the alleged federal question jurisdiction derives solely from the FDIC's alleged status as a party, and —

   (a) the FDIC manufactured party status with no basis in law or fact, by intervening in state court pursuant to a state rule allowing intervention without leave of court — subject to being stricken on an opposing party's motion — and then immediately removing the case to federal court, thus circumventing the state court's review of the propriety of the intervention, and

(b) the court of appeals allowed the FDIC to further evade Article III's federal question requirement by failing to require the FDIC to satisfy the requirements for intervention under Rule 24(a)(2) of the Federal Rules of Civil Procedure.

5. Whether the law of this Court and other circuits compels the conclusion that 12 U.S.C. §1819(b)(2)(A) and (B) are unconstitutional to the extent that they create federal jurisdiction in this purely state-law case despite the absence of an Article III "case" or "controversy" that "aris[es] under" federal law.

6. Whether the court of appeals, contrary to the law of this Court and other circuits, violated notions of federalism and comity in allowing the FDIC to manufacture federal jurisdiction in a purely state-law suit involving only claims to recover on several promissory notes.

7. Whether the court of appeals, contrary to the law of this Court, improperly created a federal common law of assignments applicable to the FDIC, and erroneously held that Defendants could not assert against the plaintiff, the FDIC's assignee, defenses that it could have asserted against the FDIC and the failed bank for which it served as receiver.

8. Whether the court of appeals, contrary to the law of this Court and other circuits, violated notions of federalism and comity by improperly creating a federal common law of assignments applicable to the FDIC in holding that Defendants could not assert against the plaintiff, the FDIC's assignee, defenses that it could have asserted against the FDIC and the failed bank for which it served as receiver.

LIST OF PARTIES

Pursuant to Supreme Court Rule 14.1(b), Petitioner lists all parties to the proceeding in the District Court for the Southern District of Texas:

First Gibralter Bank, FSB	Plaintiff/Appellee
First Madison Bank, FSB	Plaintiff/Appellee
First Nationwide Bank, FSB	Plaintiff/Appellee
Federal Deposit Insurance Corporation, for Gibraltar Savings Association	Intervenor/Cross-Appellant
Gary L. Bradley	Defendant/Counter-Plaintiff Appellant/Cross-Appellee
James D. Gressett	Defendant/Counter-Plaintiff Appellant/Cross-Appellee
Circle C Development Corporation	Defendant/Counter-Plaintiff Appellant/Cross-Appellee

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rules 14.1(b) and 29.6, Circle C Development Corporation affirms that it has no parent company or subsidiaries.

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OPINIONS BELOW

The opinions and orders of the courts below are not reported. However, the opinion of the Fifth Circuit Court of Appeals is reprinted in the Appendix attached hereto at page A1. The Opinion and Final Judgment issued by the United States District Court for the Southern District of Texas are also reprinted in the Appendix, at pages A19 and A26, respectively.

JURISDICTIONAL STATEMENT

This Court has jurisdiction to review the Fifth Circuit's judgment affirming the district court's judgment in this case. The Court of Appeals filed its opinion and judgment on September 10, 1996. *See* A1.[1] On November 12, 1996, the Court of Appeals denied the Petition for Panel Rehearing filed by Petitioners Gary L. Bradley, James D. Gressett, and Circle C Development Corporation ("Defendants"). A18. Jurisdiction is proper pursuant to 28 U.S.C. §1254(1).

Because 28 U.S.C. §2403(a) may apply, this Petition has been served on the Solicitor General of the United States. S. Ct. R. 29.4(b). The Fifth Circuit did not certify to the Attorney General the fact that the constitutionality of an Act of Congress may have been drawn into question.

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[1] References to A____ are to the cited page in the attached Appendix.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES

Article III — The Judiciary

* * *

Section 2, Clause 1. Jurisdiction of Courts

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

12 U.S.C. §1819. Corporate Powers

* * *

(b) Agency Authority

* * *

(2) Federal court jurisdiction

(A) In general

Except as provided in subparagraph (D), all suits of a civil nature at common law or in equity to which the Corporation, in any capacity, is a party shall be deemed to arise under the laws of the United States.

(B) Removal

Except as provided in subparagraph (D), the Corporation may, without bond or security, remove any

action, suit, or proceeding from a State court to the appropriate United States district court before the end of the 90-day period beginning on the date the action, suit, or proceeding is filed against the Corporation or the Corporation is substituted as a party.

12 U.S.C. §1821(d) Powers and duties of Corporation as conservator or receiver

* * *

(2) General powers

(A) Successor to institution

The Corporation shall, as conservator or receiver, and by operation of law, succeed to —

(i) all rights, titles, powers, and privileges of the insured depository institution, and of any stockholder, member, accountholder, depositor, officer, or director of such institution with respect to the institution and the assets of the institution . . . .

Federal Rules of Civil Procedure: Rule 24. Intervention

(a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) *Permissive Intervention.* Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an

action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Texas Rules of Civil Procedure: Rule 60. Intervenor's Pleadings

Any party may intervene by filing a pleading, subject to being stricken out by the court for sufficient cause on the motion of any party.

STATEMENT OF THE CASE

I. Factual Background

This action arises out of a financing arrangement structured in the spring of 1985 whereby Gibraltar Savings agreed to finance the development of a master-planned community. The developer was Defendant Circle C Development Corporation ("Circle C"). *See* R. 1994.[2] Gibraltar Savings agreed to finance all phases of the development during the project's ten-year term. *Id.* at 1971, 1993. To effectuate their agreement, the parties executed the following agreements: four loans to Circle C; a personal loan to Defendants Gary L. Bradley and James D. Gressett, the principal owners of Circle C;[3] and agreements by Bradley and Gressett guaranteeing 20% of the project notes. *See* R. 1917-1813, 2971, 3195-3194.

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[2]References to "R.____" are to the cited page in the record on appeal.

[3] Bradley, Gressett, and Circle C will be referred to collectively as "Defendants."

By December of 1988, Gibraltar Savings had failed to provide the funding required by the agreements. R. 1987-1986. On December 27, 1988, the FHLBB declared Gibraltar Savings insolvent and appointed the FSLIC as receiver.[4] R. 318, 2621. The next day, the FSLIC sold many of Gibraltar Savings' assets, including the Circle C notes, to First Gibraltar Bank, FSB ("the Bank").[5] R. 3430, 3188, 2611, 2603. After the transfer, Circle C and its officers were told that they would be expected to repay prior advances under the loan agreements to the new association, the Bank, but that the Bank owed Defendants no obligation to continue funding the project. R. 3188, 2611, 2603, 1983-1982, 1668-1667. As a result of the cut-off in funding, Defendants were unable to make payments under the notes. On September 19, 1990, nearly two years after funding was cut off, the Bank sued Defendants on the contracts repudiated by its predecessor.

II. Federal Jurisdiction Does Not Exist in this Case

The federal courts do not have subject matter jurisdiction over this case. The FDIC's presence was the only basis for federal jurisdiction apparently found by the Fifth Circuit in this case. *See* A5, 11. However, the FDIC's presence cannot confer jurisdiction in this case, because the FDIC has never been and never could be a proper party.

The Bank originally sued the Defendants in Texas state court. The case remained in state court for almost three years. During that time, the state court twice denied the Bank's motions for summary judgment. *See* R. 3509.

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[4] Effective August 9, 1989, Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"), under which the FDIC succeeded FSLIC as receiver.

[5] First Madison Bank is the successor to First Gibraltar Bank, FSB, which is the assignee of some of the assets of Gibraltar Savings. First Madison is now known as First Nationwide Bank, FSB. Because the distinction between the entities is not material to this Petition, the banks will be referred to collectively as "the Bank."

After the case was set for trial, the FDIC intervened pursuant to a state court rule that allows anybody to intervene in any case without prior leave of court. R. 3216. This rule, however, also provides that the intervention is subject to being stricken on the motion of any party. Tex. R. Civ. P. 60. At the same time the FDIC filed the intervention — and before Plaintiffs had the opportunity to move to strike the FDIC's intervention under the state procedure — the FDIC removed the case to federal court pursuant to 12 U.S.C. §1819(b)(2)(B). R. 3380. The FDIC had not been sued by any party, nor had Defendants asserted any affirmative claims for relief against the failed bank. Indeed, the FDIC's plea in intervention recognized this salient fact, as it sought a declaratory judgment that would merely (1) support the Bank's right to recover on the notes against Defendants and (2) support the Bank's argument that Defendants' defenses would not defeat the Bank's claims. *See* R. 3212-3211. The FDIC's unstated reason for intervening was to help the Bank "appeal" the denial of its summary judgment motions to the federal court, thereby avoiding a jury trial.

In the face of the FDIC's wrongful intervention and removal, Defendants filed a Motion to Strike and Motion to Remand. R. 3521. The federal district court took no action on the motion at that time, but instead entertained argument on the third summary judgment motion filed by the Bank and the FDIC. *See* R. 3789. On May 18, 1995, the federal district court entered summary judgment in favor of the Bank and dismissed the FDIC. A23-25. In its Opinion on Summary Judgment, the court acknowledged that the FDIC had intervened unnecessarily, had no interest in the action, and had simply "wasted everyone's money." A23. It therefore dismissed the FDIC as "improvidently intervening." A30. Despite the fact that the FDIC's presence was the sole alleged basis for federal jurisdiction, the court denied the Defendants' motion to remand and proceeded to render summary judgment on the merits against Defendants. A26-30.

Defendants filed timely notices of appeal from the final judgment. R. 3944, 4009. After expressly reviewing the district court's judgment de novo, the court of appeals for the Fifth Circuit affirmed, although on different grounds. A1-17. The court of appeals first held that the FDIC was a proper party to the case because it intervened in the state court pursuant to Rule 60 of the Texas Rules of Civil Procedure. A6-7. The court declined to address whether the FDIC met the requirements for intervention imposed by Fed. R. Civ. P. 24(a), "[b]ecause there are other grounds on which to conclude that the FDIC was entitled to intervene." A11 n.10. The court did not, however, specify those "other grounds." *See id.* The court of appeals also held that the summary judgment against the Defendants was proper. A13-17. Finally, the court of appeals affirmed the dismissal of the FDIC — whose presence was found to confer jurisdiction in the first place — on the ground that, once judgment was entered against Defendants, "any threat to the FDIC's interests terminated." A11. As set forth below, the FDIC's presence cannot confer federal subject matter jurisdiction because the FDIC has never been a proper party to this case.

REASONS FOR GRANTING THE WRIT

I. Overview

It is a fundamental precept that federal courts are courts of limited jurisdiction. *Owen Equip. & Erection Co. v. Kroger,* 437 U.S. 365, 374 (1979). The Fifth Circuit's judgment in this case violates this central principle of American law by allowing the FDIC to evade several limitations on federal jurisdiction.

As a threshold matter, the court of appeals' judgment conflicts with the law of other circuits, which holds that an intervenor must independently meet the jurisdictional requirements of Article III of the Constitution. *See Mausolf v. Babbitt,* 85 F.3d 1295, 1300-01 (8th Cir. 1996); *Building and Constr. Trades Dept., AFL-CIO v. Reich,* 40 F.3d 1275, 1282 (D.C. Cir. 1994). A split

of authority in the circuits exists on this issue.[6] Indeed, this Court, calling the courts of appeals' decisions "anomalous," expressly reserved the issue for decision more than ten years ago in *Diamond v. Charles,* 476 U.S. 54, 68-69 & n. 21 (1986). This Court's precedent regarding federal subject matter jurisdiction — as well as the nature and purpose of intervention — compel the conclusion that intervenors must satisfy the requirements of Article III.

Furthermore, the court of appeals' judgment improperly allows the FDIC to avoid two important limits that Article III imposes on federal jurisdiction: the requirements of (1) a "case" or "controversy" (2) "arising under" federal law. The FDIC's intervention has neither of these critical elements of federal jurisdiction.

As an initial matter, the court of appeals' ruling allows the FDIC to evade the "case" or "controversy" requirement of Article III. The Fifth Circuit's opinion permits the FDIC to intervene as a plaintiff in this case — despite the fact that it asserts no claims on its own behalf and can point to no "injury in fact" that it has suffered. This ruling conflicts with this Court's jurisprudence concerning Article III standing.

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[6]*See Mausolf v. Babbitt,* 85 F.3d 1295, 1300-01 (8th Cir. 1996) (requiring intervenor to meet Art. III); *Building and Constr. Trades Dept., AFL-CIO v. Reich,* 40 F.3d 1275, 1282 (D.C. Cir. 1994) (same); *Associated Builders & Contractors v. Perry,* 16 F.3d 688, 690 (6th Cir. 1994) (holding intervenor need not meet Art. III); *United States Postal Serv. v. Brennan,* 579 F.2d 188, 190 (2d Cir. 1978) (same); *Portland Audubon Soc. v. Hodel,* 866 F.2d 302, 308 n.1 (9th Cir.) (holding that an intervenor need not independently satisfy standing requirement and noting that the standing requirement is implicitly addressed by the "interest" requirement for intervention), *cert. denied,* 492 U.S. 911 (1989); *Chiles v. Thornburgh,* 865 F.2d 1197, 1212-13 (11th Cir. 1989) (stating that although intervenor need not demonstrate standing, standing cases are relevant to whether sufficient interest exists under Rule 24(a)(2)) (dicta); *United States v. 39.96 Acres of Land,* 754 F.2d 855, 859 (7th Cir. 1985) (indicating that "interest" requirement for intervention is more onerous than the standing requirement), *cert. denied,* 476 U.S. 1108 (1986).

The court of appeals' judgment also allows the FDIC to evade the Article III requirement that, in the absence of diversity of citizenship, federal jurisdiction may be asserted only in cases "arising under" federal law. CONST. ART. III, §2. The FDIC claims that this case arises under FIRREA, which provides that a case arises under federal law if the FDIC is "a party." 12 U.S.C. §1819(b)(2)(A). The FDIC has, however, evaded this statutory limitation — and thereby the constitutional "arising under" requirement — by manipulating a state court procedural rule to manufacture "party" status that has no basis in law or fact. Although neither the Defendants nor the Bank had asserted claims against the failed bank or the FDIC in state court, the FDIC intervened under a state court rule permitting intervention without leave of court, subject to being stricken upon an opposing party's motion. Then, "[a]s apparently has become [the] FDIC's practice in cases of this kind," the FDIC circumvented any review in the state court as to whether it was a proper party by immediately removing the cases to federal court. *BankOne, Texas, N.A. v. Elms,* 764 F.Supp. 85, 87 (N.D. Tex. 1991). Once in federal court, the Bank and the FDIC contended — and the court of appeals accepted — that the FDIC is somehow exempt from the intervention requirements of Rule 24 of the Federal Rules of Civil Procedure, even though the existence of federal question jurisdiction under §1819 hinges on whether the FDIC is a proper party to the case. Thus, the court of appeals allowed the FDIC to create federal jurisdiction by manipulating a state court procedural rule and its federal removal power in a manner that evaded review in either court of whether it was a proper party to the case.

The court of appeals' error was not, however, limited to jurisdictional errors. The court of appeals' opinion also directly conflicts with the rulings of this Court on a fundamental issue of law: whether, in an action by an assignee asserting the claims of a failed bank, the defendant is entitled to assert against the assignee the same defenses he would have had against the failed bank, so long as the defenses do not rely on the type of unrecorded

agreements prohibited by the *D'Oench Duhme* doctrine. *See O'Melveny & Myers v. FDIC*, ____ U.S. ____, 114 S.Ct. 2048, 2054 (1994). The court of appeals held that Defendants Bradley and Gressett had properly reserved defenses against the failed institution, Gibraltar Savings, and its successors, the FSLIC and the FDIC. A16. However, the court then held, without explanation, that these defenses "would be meaningful only in a lawsuit against those entities; the rights are irrelevant in the instant case." *Id.* This holding directly conflicts with not only black-letter state law on assignments, but also the holding of this court in *O'Melveny*.

The court of appeals' ruling on these issues offends federalism and comity. By allowing the FDIC, which has no cognizable interest in this suit, to remove this purely state-law case to obtain review of the denial of the Bank's summary judgment motions in federal court, the court of appeals has sanctioned the trampling of state sovereignty. By granting the FDIC unprecedented powers to give its assignee more rights than it possessed as assignor, the court of appeals has also disregarded applicable state law regarding assignments. These violations of federalism and comity further justify granting the writ in this case.

II. The Court of Appeals' Implicit Holding that the Intervenor FDIC Did Not Have to Meet the Requirements of Article III Conflicts with the Law of this Court and Other Circuits

A. A Split of Authority Exists as to Whether an Intervenor Must Independently Satisfy Article III

The court of appeals failed to address the Defendants' argument that no federal subject matter jurisdiction existed over the FDIC's claims, thus implicitly holding that the FDIC did not have to independently meet the requirements of Article III when it intervened. *See* A8-11 (addressing only whether the FDIC had an interest in the litigation). This Court has previously recognized a split of authority in the Circuits on this issue, while

expressly reserving decision on the question. *See Diamond v. Charles*, 476 U.S. 54, 68-69 & n. 21 (1986).

The Fifth Circuit's judgment conflicts with the law of the District of Columbia Circuit and the Eighth Circuit, which require intervenors to satisfy Article III. *Mausolf v. Babbitt*, 85 F.3d 1295, 1300-01 (8th Cir. 1996); *Building and Constr. Trades Dept., AFL-CIO v. Reich*, 40 F.3d 1275, 1282 (D.C. Cir. 1994). In contrast, the Second and Sixth circuits hold that an intervenor need not independently satisfy Article III. *See Associated Builders & Contractors v. Perry*, 16 F.3d 688, 690 (6th Cir. 1994); *United States Postal Serv. v. Brennan*, 579 F.2d 188, 190 (2d Cir. 1978). The Ninth and Eleventh circuits take a middle ground. *See Portland Audubon Soc. v. Hodel*, 866 F.2d 302, 308 n.1 (9th Cir. 1989) (holding that an intervenor need not satisfy an independent standing requirement, and noting that the standing requirement is implicitly addressed by the "interest" requirement for intervention), *cert. denied*, 492 U.S. 911 (1989); *Chiles v. Thornburgh*, 865 F.2d 1197, 1212-13 (11th Cir. 1989) (stating that although intervenor need not demonstrate standing, standing cases are relevant to whether sufficient interest exists under Rule 24(a)(2)) (dicta). The Seventh Circuit, meanwhile, has indicated that the "interest" requirement for intervention is more onerous than the standing requirement. *See United States v. 39.96 Acres of Land*, 754 F.2d 855, 859 (7th Cir. 1985), *cert. denied*, 476 U.S. 1108 (1986). The division of authority among the circuits on this important issue of federal jurisdiction — a division this Court has labeled "anomalous," *Diamond*, 476 U.S. at 68-69 — warrants the grant of the writ of certiorari in this case.

B. The Jurisprudence of this Court and Other Circuits Compels the Conclusion that Intervenors Must Independently Satisfy Article III

The Fifth Circuit's failure to require that the FDIC's intervention satisfy Article III contravenes the law of this Court and other Circuits, violates the principle of limited federal jurisdiction, and misunderstands the nature and purpose of intervention.

As previously noted, it is a fundamental precept that federal courts are courts of limited jurisdiction. *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1979). Indeed, Article III of the Constitution not only grants federal court jurisdiction, but also limits it:

> Article III, which is every bit as important in its circumscription of the judicial power of the United States as in its granting of that power, is not merely a troublesome hurdle to be overcome if possible so as to reach the "merits" of a lawsuit which a party desires to have adjudicated; it is a part of the basic charter promulgated by the Framers of the Constitution at Philadelphia in 1787 . . . .

Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 476 (1982).

This Court's jurisprudence makes clear that Article III's limitations on jurisdiction apply to each party individually — not the case as a whole: in other words, the fact that existing parties in a case may satisfy Article III's requirements does not mean that an intervenor is absolved of the need to independently satisfy Article III. "[A]t an irreducible minimum, Art. III requires *the party who invokes the court's authority* to show that *he personally* has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," *Valley Forge*, 454 U.S. at 472 (emphasis added); *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563 (1992) (holding that Article III's "injury in fact" requirement "requires that the party seeking review be himself among the injured"). In other words, "[t]hose who do not possess Art. III standing may not litigate as suitors in the courts of the United States." *Valley Forge*, 454 U.S. at 475-76. Because an intervenor participates on equal footing with the original parties to a suit, a movant for leave to intervene under Rule 24(a)(2) must satisfy the same Article III standing requirements as the original parties. *Building*, 40 F.3d at 1282; *see Mausolf*, 85 F.3d at 1300-01.

Nothing in the nature of intervention procedure permits Congress to abrogate Article III's requirements by enacting Rule 24(a). Rather, as this Court has held, it is "fundamental that Congress could not expand the jurisdiction of the federal courts beyond the bounds of Article III." *Seminole Tribe of Fla. v. Florida*, ____U.S.____, 116 S.Ct. 1114, 1128 (1996). Rule 24(a) itself says nothing about standing. *Mausolf*, 85 F.3d at 1299. It certainly does not address the Article III standing requirements of injury in fact, causation, and redressability — much less the Article III requirement that the case arise under federal law. *See* Fed. R. Civ. P. 24(a). To the contrary, Rule 24(a) itself speaks only to practical concerns by requiring that intervenors have a recognized interest in the subject matter of the litigation, which might be impaired by the disposition of the case, and which will not be adequately protected by the existing parties. *Mausolf*, 85 F.3d at 1300 (citing *New Orleans Public Serv., Inc. v. United Gas Pipeline Co.*, 732 F.2d 452, 464 (5th Cir.) (analogizing intervention requirements to prudential standing rules), *cert. denied*, 469 U.S. 1019 (1984)); *see* Fed. R. Civ. P. 24(a).

Nor does the purpose of intervention authorize Congress to abrogate Article III by enacting Rule 24. One of the purposes of intervention is to achieve judicial economy by resolving related issues in a single lawsuit. *United States v. Texas Eastern Transmission Corp.*, 923 F.2d 410, 412 (5th Cir. 1991); *see Mausolf*, 85 F.3d at 1300. The importance of judicial economy does not, however, authorize Congress to circumvent Article III's limits on judicial power by enacting a civil procedure rule. *Mausolf*, 85 F.3d at 1300 (citing *Seminole Tribe*, 116 S.Ct. at 1128). As the *Mausolf* court noted, Congress could no more use Rule 24 to abrogate Article III's requirements than it could expand the Supreme Court's original jurisdiction by statute. 85 F.2d at 1300 (citing *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803)).

A practical look at how intervention fits into the spectrum of procedures by which a third party can affect ongoing litigation

makes clear that the ability to intervene does not eliminate Article III's requirements. If Article III does not apply to intervenors, and if all that is required of intervenors is an interest in the case, then the amicus process is superfluous. People with mere interests in a case become amici curiae; people with Article III standing become parties. Tacitly recognizing this distinction, this Court has "abjured appeals to [federal courts'] authority which would convert the judicial process into no more than a vehicle for the vindication of the value interests for concerned bystanders." *Valley Forge*, 454 U.S. at 473. To prevent federal courts from becoming "judicial versions of college debating forums," *id.*, intervenors must be required to satisfy the requirements of Article III.

Even if this Court determines that an intervenor need not independently meet Article III's requirements, reversal is nevertheless required in this case because any rule that an intervenor need not satisfy Article III should apply only when an intervenor is entitled to intervene as of right. *See Portland Audubon Soc. v. Hodel*, 866 F.2d 302, 308 n.1 (9th Cir. 1989) (suggesting that a finding that a party meets the requirements of Rule 24(a)(2) satisfies Article III). In this case, however, the court of appeals held that the FDIC needn't meet the requirements for intervention as of right under Rule 24(a) to intervene. *See* A11 n.7. As discussed below, an analysis of Rule 24(a)'s requirements makes clear that the FDIC was not entitled to intervene as of right. *See* Part III.B.2., *infra*. If Rule 24(a)'s purpose is to ensure that intervenors also meet Article III's requirements, then the Fifth Circuit's failure to require the FDIC to meet Rule 24(a) is an error of constitutional proportions justifying the grant of the writ of certiorari.

III. A Finding that Federal Jurisdiction Exists in this Case Would Conflict with the Law of This Court and Other Circuits

As this Court has held, "[t]he limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded." *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1979). The Fifth Circuit's holding in this case permitted the FDIC to litigate in federal court on the theory that 12 U.S.C. §1819(b)(2)(A) and (B) create jurisdiction, even though its intervention (1) presented no "case" or controversy (2) "arising under" federal law, as required by Article III, this Court's decisions, and the law of other circuits. To the extent that this statute can be read to create federal jurisdiction in a purely state law case in the absence of a "case" or "controversy" that "aris[es] under" federal law, the statute is unconstitutional.

A. The FDIC's Intervention Presents No "Case" or "Controversy"

Article III limits the judicial power of the United States to the resolution of "cases" and "controversies." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982); *see* CONST. ART. III, §2. As an incident to this "bedrock requirement," Article III requires that litigants have standing to challenge the action sought to be adjudicated in the lawsuit. *Id.; see Lujan v. Defenders of Wildlife*, 504 U.S. 553, 560 (1992). As a component of standing, Article III requires that the plaintiff must have suffered an injury in fact — "an invasion of a legally protected interest which is (a) concrete and particularized, . . . and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560.

By holding that the FDIC was properly a plaintiff in this case, the court of appeals utterly ignored this "bedrock requirement" of Article III. The FDIC can show no injury in this case — much less the kind of actual, imminent, concrete, and particularized

injury required to establish injury in fact. The FDIC, upon intervening as a plaintiff, asserted no claims for relief on its own behalf. Rather, the FDIC sought only declarations that (1) would support the Bank's right to recover against Defendants on the notes and (2) would support the Bank's argument that Defendants' defenses would not defeat the Bank's claims. R. 3212-3211. The Defendants have never asserted claims or defenses against the FDIC or the failed bank for which it served as receiver. *See* R. 3234, 3232-3218. Nor has the Bank ever asserted such claims. *See* R. 3372-3367, 3360-3351. The FDIC's intervention functioned as a "me too" pleading that merely supported the Bank's claim for relief while ostensibly providing an excuse to remove the case to federal court. A party cannot create standing by asserting the rights of a third party. *See Laird v. Tatum*, 408 U.S. 1, 13 n.7 (1972). Consequently, nothing in the FDIC's allegations or proof establishes injury in fact.

Although the court of appeals did not directly address the injury-in-fact requirement, the court did suggest that the FDIC had an "interest" in the case for two reasons: (1) the FDIC guaranteed the Bank a return on the book value of the loans assigned to the Bank, and (2) the state court allegedly sought to adjudicate whether the FDIC had assigned notes and guarantees to the Bank unencumbered by continuing funding obligations.[7] A8-11. Any holding that the FDIC's alleged indemnification interest supports a finding of injury in fact conflicts with the conclusion of other circuits that such an indirect, consequential interest cannot support standing. *See Penda Corp. v. United States*, 44 F.3d 967, 972 (Fed. Cir. 1994), *cert. denied*, ____ U.S. ____, 115 S.Ct. 1962 (1995). In *Penda*, the plaintiff sued the government for patent infringement, and Cadillac,

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[7] The court of appeals also held that the FDIC had an interest because the Defendants supposedly "asserted claims against [the failed bank], and the FDIC is entitled to intervene when claims are brought against a failed bank for which it was appointed as receiver." A9. As previously shown, Defendants made no such claims. R. 3372-3367, 3360-3351.

which had agreed to indemnify the government, was a third-party defendant. *Id.* at 969. The district court held that the government had infringed the patent, and the government and Cadillac appealed. *Id.* The government later withdrew its appeal, but Cadillac continued to prosecute its appeal. *Id.* The Third Circuit held that "[e]ven if Cadillac is ultimately held liable to the Government under their indemnification agreement, Cadillac's pecuniary interest is indirect and consequential, rather than direct and immediate." *Id.* at 972. Accordingly, the court of appeals held that Cadillac's interest as indemnitor did not confer Article III standing. *Id.*

In this case, the FDIC's claimed interest is even more conjectural and speculative than that in *Penda*. The Fifth Circuit merely found that the FDIC had guaranteed the Bank a rate of return on the book value of the loans it assigned to the Bank. A9. Nowhere has the FDIC pleaded or proved that the success of the Defendants' defenses would actually — or even probably — push the book value of the loans below the rate of return guaranteed to the Bank. Any interest the FDIC has by virtue of its guarantee is therefore merely hypothetical. Accordingly, the FDIC has failed to meet its burden to plead and prove standing on this ground. *See Lujan*, 540 U.S. at 560.

Nor can injury in fact be found in the Fifth Circuit's suggestion that the state court's ruling somehow threatened the very foundation of the authority Congress granted to the FDIC. *See* A7 & n.7. As an initial matter, the Fifth Circuit's conclusion was factually unsupported. The state court in no way questioned the authority of the FDIC or Congress. *See* R. 3509-3508. Rather, the state court simply held that, based on the testimony of an officer of the Bank, a fact issue existed as to the ownership of the notes and guarantees. *See id.* Specifically, the Bank's chairman and chief executive officer had testified that the Bank was simply an asset manager, and that the FSLIC was the owner of the agreements in issue. R. 1444. While the state court viewed this testimony as raising a fact issue as to whether the assets were,

in fact, transferred in this particular case, the state court did not suggest that the FDIC did not have powers granted to it by Congress. *See* R. 3509-3508.

More importantly, the Fifth Circuit's holding offends terribly the notions of comity and federalism. Underlying the foundation of our system is the assumption that both state and federal systems will properly execute the tasks they have been assigned. *See Marcal Paper Mills, Inc. v. Ewing*, 790 F.2d 195, 196 (1st Cir. 1986) (holding considerations of comity and federalism "counsel respect for . . . the ability of state courts to give proper attention to federal law defenses"). There is simply no support for the Fifth Circuit's suggestion that the state court's denial of summary judgment in favor of a full trial on the merits could create federal jurisdiction in the district court, even if one agreed that the state court somehow "threatened" the foundation of the authority Congress granted to the FDIC. On this point, the opinion in effect holds that the FDIC was justified in dragging two private parties into federal court on the fear that the state court might misapply the law at some future date.

In sum, federal jurisdiction is absent in this case because the FDIC's intervention presents no case or controversy under Article III.

B. The FDIC's Intervention Evades the Requirement that Cases Must "Aris[e] Under" Federal Law

The court of appeals' judgment also allows the FDIC to evade the Article III requirement that, in the absence of diversity of citizenship, federal jurisdiction may be asserted only in cases "arising under" federal law. CONST. ART. III, §2. No federal claims were asserted in this case. To the contrary, this case presents only a classic state-law cause of action: a suit to collect on a note. *See* R. 3263-3252. The Fifth Circuit suggested that this case arises under 12 U.S.C. §1819, which provides that "suits . . . to which the [FDIC], in any capacity, is *a party* shall be deemed to arise under the laws of the United States." 12 U.S.C.

§1819(b)(2)(A) (emphasis added); *see* 12 U.S.C. §1819(b)(2)(B) (allowing FDIC to remove action after it becomes "a party"). The Fifth Circuit's opinion, however, permits the FDIC to evade §1819's limitation on jurisdiction — that the FDIC be a party — by manipulating a state court procedural rule to manufacture a baseless "party" status, thereby evading the constitutional "arising under" requirement. The Fifth Circuit then further circumvented Article III's requirements that federal cases must "aris[e] under" federal law by exempting the FDIC from the intervention requirements of Rule 24(a) after removal.

1. The Fifth Circuit Allowed the FDIC to Use a State Court Procedural Rule to Create Federal Question Jurisdiction

The Fifth Circuit held that because the FDIC followed the first half of Texas' intervention procedure, it was a proper party to this case. A6-7. Texas civil procedure rules permit any person to intervene in any case, subject to being stricken upon motion of any party. Tex. R. Civ. P. 60. Thus, under the state court procedure, a would-be intervenor need not obtain leave of court; rather the party who opposes intervention must challenge the intervention by motion. *Guaranty Fed. Sav. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 657 (Tex. 1990). The court of appeals treated the FDIC's intervention in state court as final and complete, even though the FDIC had precluded the state court from performing the second step of the state procedure — review of the propriety of the FDIC's intervention — by simultaneously removing. Because this case was removed to federal court before the state procedure for evaluating the propriety of the intervention could be followed, the state rule did not render the FDIC a proper party to the case.

Indeed, when the federal district court actually considered whether the FDIC was a proper party, the federal district court ruled that the FDIC intervened unnecessarily, had no interest in the action, and should be dismissed from the action as "improvidently intervening." A23, 30. Although the court of appeals

affirmed the dismissal of the FDIC, it rejected the district court's finding that the FDIC had no interest. A8-11. The court of appeals declined, however, to address whether the FDIC had met the remaining requirements for intervention under the federal rule. *See* A11 n.10. Instead, without explanation or citation to authority, the court cryptically held that the FDIC need not meet the requirements for intervention under Rule 24(a)(2). *See id.* Since the FDIC avoided judicial review of its intervention in the state court by simultaneously filing its removal petition, the Panel's conclusion that the FDIC was immune from the requirements of Rule 24 effectively granted the FDIC carte blanche to create federal jurisdiction in any case pending in any court in the State of Texas. Because the court of appeals' opinion allows a state court procedural rule to create federal jurisdiction, it conflicts with the well-established rule that only Article III can confer jurisdiction, as well as with the rule that federal jurisdiction is limited in nature. *See* Part II.B., *supra.*

2. The Fifth Circuit Allowed the FDIC to Evade Article III's Federal Question Jurisdiction Threshold by Failing to Require the FDIC to Satisfy the Requirements for Intervention

By failing to require the FDIC to meet the requirements for intervention as of right, the Fifth Circuit's opinion further permits the FDIC to evade the Article III requirement that cases must "aris[e] under" federal law. Because the FDIC was not entitled to intervene in this case under Rule 24, it is not "a party" and therefore cannot rely on §1819 to supply federal jurisdiction.

In a footnote, the court of appeals apparently dismissed the notion that the FDIC is required to comply with *all* of Rule 24(a)'s requirements for intervention as of right:

> Because there are other grounds on which to conclude that the FDIC was entitled to intervene in this case, the court need not discuss whether the FDIC also satisfied the criteria for intervention under Fed. R. Civ. P. 24(a)(2).

A11 n.10.[8] The court of appeals apparently held that the FDIC's purported "interest" in this case, standing alone, justifies intervention. Nothing in Rule 24(a), however, excuses the FDIC from compliance with its requirements for intervention, and the court of appeals cites no authority for the proposition that there is some sort of common law right to intervene.[9] The creation of this right is not only unsupported; more importantly, it permits the FDIC to create federal jurisdiction in contravention of Article III and the cases of this Court.

If the court of appeals had applied Rule 24(a)(2) to this case, it would have found intervention inappropriate. The four requirements for intervention under Rule 24(a) are as follows:

> (1) the application for intervention must be timely;
>
> (2) the applicant must have an interest relating to the property or transaction which is the subject of the action;
>
> (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest, and,

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[8]The court of appeals did not address whether the FDIC could have permissively intervened. Nor did the district court hold that the FDIC permissively intervened — to the contrary, the district court dismissed the FDIC because its intervention was unnecessary and "improvident[]." A23, 30. Indeed, permissive intervention would have been improper, since the FDIC satisfied neither of the requirements: (1) timely application, and (2) that the applicant's claim and the main action have a common question of law or fact. Fed. R. Civ. P. 24(b); *U.S. v. State of Mississippi*, 958 F.2d 112, 116 (5th Cir. 1992); *see infra*, this section.

[9]Indeed, in the cases cited by the court of appeals, the parties either did not challenge the propriety of intervention or challenged only one of the required elements for intervention — the existence of an interest. *See Bank One Texas, N.A. v. Morrison*, 26 F.3d 544, 547 (5th Cir. 1994); *FSLIC v. Griffin*, 935 F.2d 691, 696 (5th Cir. 1991), *cert. denied*, 502 U.S. 1092 (1992); *Pernie Bailey Drilling Co. v. FDIC*, 905 F.2d 78, 80 (5th Cir. 1990); *Beighley v. FDIC*, 868 F.2d 776, 779, 781-82 (5th Cir. 1989).

(4) the applicant's interest must be inadequately represented by the existing parties to the suit.

New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co., 732 F.2d 452, 463 (5th Cir.), *cert. denied*, 469 U.S. 1019 (1984); *see* Fed. R. Civ. P. 24(a)(2). Because the FDIC cannot meet all four elements, intervention was improper.[10]

First, the FDIC's intervention was untimely. The lawsuit was filed in September of 1990. Although the FDIC now argues that the Defendants' pleadings implicated its interests, the FDIC waited to intervene until nearly three years after suit was filed, and after two of the Plaintiffs' summary judgment motions had been denied. The Fifth Circuit has previously termed a delay of two years to be "inordinately long" and "manifestly excessive," *Corley v. Jackson Police Dept.*, 755 F.2d 1207, 1210 (5th Cir. 1985), and has rejected interventions based on similar and even shorter delays. *See Engra, Inc. v. Gabel*, 958 F.2d 643, 645 (5th Cir. 1992) (eight-month delay); *Smith v. Missouri Pacific R. Co.*, 615 F.2d 683, 685 (5th Cir. 1980) (two-year delay).

Second, for a party to have a right to intervene, the intervenor must have "a direct, substantial, legally protectable interest in the proceedings." *New Orleans*, 732 F.2d at 463. "[S]omething more than an economic interest is necessary." *Id.* at 464; *see id.* at 466. Although the court of appeals' opinion expressly declines to apply Rule 24(a), it suggests that the FDIC had an interest in this case because (1) the FDIC had guaranteed FGB a return on the book value of the loans assigned to the Bank, A8, and (2) the Defendants supposedly asserted claims against, or at the very least referenced the actions of, the failed bank or receiver,

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[10]Furthermore, to the extent that the test for intervention as of right also determines whether an intervenor meets Article III's standing requirements, *see* Part II.B., *supra*, the court of appeals' decision to exempt the FDIC from Rule 24(a)(2)'s requirements is an error of constitutional proportions.

A9-11.[11] Neither of these "interests" support intervention under Rule 24(a).

As an initial matter, the FDIC's Plea in Intervention does not mention the guarantee as an interest supporting its intervention — much less seek relief based on the guarantee. See R. 3213, ¶9. Furthermore, the FDIC's guarantee that the Bank would obtain a rate of return is a contingent interest that comes into being only if, in fact, the Bank does not obtain that rate of return. *See* Part III.B., *supra.* It is, therefore, insufficient to establish a right to intervene. *See Travelers Indemnity Co. v. Dingwell,* 884 F.2d 629, 638 (1st Cir. 1989); *Restor-a-Dent Dental Labs., Inc. v. Certified Alloy Products, Inc.,* 725 F.2d 871, 874-75 (2d Cir. 1984).

Furthermore, as previously shown, Defendants did not assert claims against the failed bank. *See* Part III.A., *supra.* The court of appeals erroneously suggests that the FDIC can intervene if the defendants' defenses or claims "reference or rely on the actions of the failed bank or its receiver," even if the defendant does not assert any counterclaims against the failed bank. A10. The case on which the court of appeals' opinion relies, *Bank One Texas, N.A. v. Morrison,* 26 F.3d 544 (5th Cir. 1994), is inapposite. In *Morrison* the defendant — unlike the Defendants in this case — actually sought affirmative relief from the failed bank:

> Morrison's counterclaim refers to "counter-defendant Mbank, Bank One's predecessor," and asserts that "[t]he actions of MBank and Bank One constitute a fraud on Gary Morrison and an attempt to unjustly enrich themselves." The relief sought was against "the counter-defendant."

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[11]The court of appeals also suggested that the state court threatened the foundation of authority Congress granted to the FDIC. *See* Part III.A., *supra.* As previously discussed, the state court did no such thing and, even if it had, such a threat would not give rise to federal jurisdiction in the district court. *See id.*

Morrison, 26 F.3d at 547. Accordingly, Defendants' mere references to the failed bank or receiver do not give the FDIC an interest that supports intervention.

Finally, intervention may only be permitted if the applicant's interest is inadequately represented by existing parties to the suit. *New Orleans,* 732 F.2d at 463. "[W]hen the party seeking intervention has the same ultimate objective as a party to the suit, a presumption arises that its interests are adequately represented." *Bush v. Viterna,* 740 F.2d 350, 355 (5th Cir. 1984). To overcome this presumption, the intervenor must demonstrate "adversity of interest, collusion, or nonfeasance." *Id.* at 355, 356. In this case, the FDIC, in its Plea in Intervention, pleaded that it had the same objective as the Bank: to obtain declarations that would help establish the Bank's right to recover against the Bank for Defendants' alleged default on the promissory notes. *See* R. 3212-3211. A presumption therefore arises that its interests are adequately represented. *Bush,* 740 F.2d at 355. The FDIC has not rebutted this presumption.

In sum, because the FDIC is not a proper party, §1819(b)(2)(A) and (B) have no application to this case. Because §1819(b)(2)(A) and (B) have no application to this case, there is no basis for federal question jurisdiction under Article III.

C. To the Extent §1819 Creates Federal Jurisdiction in this Case, It Is Unconstitutional

As previously discussed, the Fifth Circuit held that federal jurisdiction exists pursuant to 12 U.S.C. §1819. Surely, Congress did not intend to, and the statute does not in fact, confer federal jurisdiction whenever the FDIC is able to file a pleading in a preexisting, purely state-law case, regardless of whether the FDIC's intervention satisfies the "case" or "controversy" and "arising under" requirement of Article III. However, to the extent that §1819 can be read to create federal jurisdiction in a purely state-law case in the absence of a "case" or "controversy"

that "aris[es] under" federal law, the statute is unconstitutional under the authorities discussed in Parts III.A. and III.B. *See Seminole Tribe of Fla. v. Florida,* ___ U.S. ___, 116 S.Ct. 1114, 1128 (1996).

IV. The Court of Appeals' Holding that the Defendants Could Not Assert Their Defenses Against the Bank Contradicts the Law of this Court

Defendants have raised a number of defenses in this case, including prior breach of the agreements in issue by the Bank's predecessor, the failed Gibraltar Savings. The Fifth Circuit held that the Defendants had properly reserved their defenses arising from the actions of the failed bank, the FSLIC, or the FDIC. A16. However, without explanation or citation to authority, the court also concluded that the defenses were "irrelevant" in a suit against the Bank — which was the FDIC's assignee — even though they would be "meaningful" in a lawsuit against the failed bank or the FDIC. *Id.* The panel's holding on this issue flatly contradicts this Court's holding in *O'Melveny & Myers v. FDIC,* ___U.S. ___, 114 S.Ct. 2048, 2054 (1994).

As this Court held in *O'Melveny,* "the FDIC as receiver steps into the shoes of the failed S & L, . . . obtaining the rights '*of* the insured depository institution that existed prior to receivership." *Id.* (citations and quotations omitted) (emphasis original). The Court relied on FIRREA, which, in a provision captioned "[p]owers and duties of Corporation as . . . receiver," provides that the FDIC "shall . . by operation of law, succeed to . . . all rights, titles, powers, and privileges of the insured depository institution." *O'Melveny,* 114 S.Ct. at 2054 (quoting 12 U.S.C. §1821(d)(2)(A)(i)).

In *O'Melveny,* the FDIC sued a law firm for torts allegedly arising from real estate offerings in which the law firm counseled the failed savings and loan. The FDIC argued that federal common law should preclude the law firm's defense that the savings and loan's officers' knowledge of the wrongdoing should

be imputed to the savings and loan and the FDIC. *See* 114 S.Ct. at 2053. The Supreme Court rejected this argument. The Court observed that, under *Erie,* there is no federal general common law, and suggested that the Ninth Circuit's decision "adopt[ed] a special federal common-law rule divesting States of authority over the entire law of imputation." *Id.* at 2053. The Court held instead that state law governed the imputation-of-knowledge defense, and that the FDIC was subject to this defense to the same extent as its assignor was under state law. *See id.* at 2053, 2054.

The holding in *O'Melveny* is consistent with the well-established state-law principle that an assignee may receive no greater rights than those held by its assignor. *State Fidelity Mortgage Co. v. Varner,* 740 S.W.2d 477, 480 (Tex. App. – Houston [1st Dist.] 1987, writ denied); *see also Merchants Corp. of Amer. v. 9655 Long Tons, No. 2 Yellow Milo,* 238 F.Supp. 572, 574 (S.D. Tex. 1965); Farnsworth, *Contracts* §11.8 at 780 (1982). The FDIC, therefore, took the failed bank's claims against Defendants subject to the defenses that the Defendants could have asserted against the failed bank (aside from defenses barred by the *D'Oench Duhme* doctrine). By the same token, the FDIC could assign no greater rights to its assignee, the Bank, than the FDIC itself possessed. Accordingly, the Bank is subject to the Defendants' defenses. The Fifth Circuit's holding to the contrary improperly created "a special federal common law rule divesting states of authority over the entire law of" assignment. *O'Melveny* 114 S.Ct. at 2053. Because the Fifth Circuit's judgment conflicts with this Court's holding in *O'Melveny,* and offends notions of federalism and comity, Defendants respectfully submit that grant of the writ of certiorari is proper in this case.

V. Conclusion

The grant of the writ of certiorari is appropriate in this case because the court of appeals' judgment improperly exempts the FDIC as intervenor from meeting the requirements of Article III.

A proper analysis reveals Article III jurisdiction does not exist in this case because the FDIC's intervention presents no "case" or "controversy" that "arise[s] under" federal law. The court of appeals' decision to the contrary conflicts with the jurisprudence of this Court and that of other circuits, and offends notions of federalism and comity. It also improperly allows the FDIC to create federal jurisdiction by virtue of a state procedural rule. Furthermore, to the extent that 12 U.S.C. §1819(b)(2)(A) and (B) can be read to create federal jurisdiction in this purely state-law case despite the absence of an Article III case or controversy arising under federal law, it is unconstitutional.

The grant of the writ is also proper in this case because the court of appeals' holding that the Defendants were not entitled to assert against the Bank defenses that they would have had against the failed bank conflicts with this Court's holding in *O'Melveny*. The court of appeals' holding also disregards the well-established proposition that an assignee receives no greater rights than its assignor under Texas law. The Fifth Circuit's judgment therefore violates notions of federalism and comity.

Accordingly, Defendants respectfully submit that the grant of the writ would be appropriate in this case.

Respectfully submitted,

GIBBS & BRUNS, L.L.P.

By: /s/

Robin C. Gibbs
TBA No. 07853000
1100 Louisiana, Suite 5300
Houston, Texas 77002
Telephone: (713) 650-8805
Facsimile: (713) 750-0903

ATTORNEY OF RECORD FOR DEFENDANTS GARY L. BRADLEY, JAMES D. GRESSETT, AND CIRCLE C DEVELOPMENT CORPORATION

OF COUNSEL:

GIBBS & BRUNS, L.L.P.
Phillip T. Bruns
TBA No. 03258500
Paul J. Dobrowski
TBA No. 05927100
Barrett H. Reasoner
TBA No. 16641980
Jennifer Horan Greer
TBA No. 00785611
1100 Louisiana, Suite 5300
Houston, Texas 77002
Telephone: (713) 650-8805
Facsimile: (713) 750-0903

APPENDIX

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No. 95-20500

United States Court of Appeals
FOR THE FIFTH CIRCUIT

FIRST GIBRALTAR BANK, FSB

Plaintiff/Appellee,

FEDERAL DEPOSIT INSURANCE CORPORATION,
AS RECEIVER FOR GIBRALTAR SAVINGS ASSOCIATION

Intervenor-Plaintiff,
Appellee/Cross-Appellant.

v.

GARY L. BRADLEY AND JAMES D. GRESSETT AND
CIRCLE C DEVELOPMENT CORPORATION

Defendants,
Intervenor-Defendants,
Appellants, Cross-Appellees

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-93-2558)

Before JONES, SMITH, and STEWART, Circuit Judges.

EDITH H. JONES, Circuit Judge:*

* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

Gary L. Bradley ("Bradley"), James D. Gressett ("Gressett"), and Circle C Development Corporation ("Circle C") appeal the district court's summary judgment in favor of First Gibraltar Bank ("FGB"), on FGB's suit to recover over $80 million on four promissory notes that Circle C executed in favor of Gibraltar Savings Association ("Gibraltar") and to recover from Bradley and Gressett on their personal guarantees of those four notes as well as on their separate, personal note for $15 million. After reviewing the district court's judgment de novo, this court AFFIRMS.

FACTUAL BACKGROUND

This saga began in 1985 when Circle C, Bradley, and Gressett entered into a series of loan agreements with Gibraltar for the development of Circle C Ranch, a master planned community located southwest of Austin, Texas. Gibraltar advanced nearly $80 million to Circle C on four loans (the "Project Notes"): the Land Note, Amenities Note, Phase I Development Note, and Phase II Development Note. Bradley and Gressett individually guaranteed 20%. of Circle C's notes and were the borrowers under a fifth, unsecured personal loan of $15 million ("Personal Note").

The terms of the Personal Note required Bradley and Gressett to make quarterly interest payments beginning in September of 1985. Importantly, the Personal Note, though unsecured, and the Project Notes contained cross-default provisions by which a default under either the Personal Note or any of the Project Notes operated as a default under all of the notes.

In May 1988, Bradley and Gressett defaulted on the Personal Note when they failed to make a quarterly interest payment. The next month, Gibraltar declared a default on the Personal Note because they had failed to cure their delinquency. Gibraltar accelerated the balance of the Personal Note and declared it, with all accrued but unpaid interest, payable immediately.

In an effort to ameliorate the financial strain caused by the default, Bradley and Gressett sold a 50% interest in Circle C for over $1 million in cash and promissory notes totaling nearly $30.5 million. Circle C was then restructured by transferring all of its interests in the Circle C Ranch to the Circle C Development Joint Venture ("Joint Venture").

Besides these measures, Bradley and Gressett also negotiated a work-out agreement with Gibraltar, titled a Reinstatement Agreement and First Loan Modification ("Work-out Agreement").[1] Pursuant to this agreement, executed November 3, 1988, Gibraltar rescinded the acceleration of the notes, while Bradley and Gressett reaffirmed their obligations under the Personal Note.

The Work-out Agreement proved unsuccessful. On December 1, 1988, less than one month after the work-out had been reached, Bradley and Gressett again defaulted on the Personal Note when they failed to make another quarterly interest payment. Threatened under the notes' cross-default provision, Bradley and Gressett continued to seek nearly $20 million in additional funding for their ranch project.

However, on December 27, 1988, the Federal Home Loan Bank Board ("FHLBB") declared Gibraltar insolvent and appointed the FSLIC as receiver.[2] Furthermore, the FHLBB determined that Gibraltar had insufficient assets to satisfy its secured and deposit liabilities, so that no assets were available to pay the claims of general, unsecured creditors. As a result, on December 28, 1988, the FSLIC sold and endorsed many of Gibraltar's assets, including all of the Bradley-Gressett and Circle C Notes and guarantees to FGB, the successor bank.[3] Under the acquisi-

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[1] The effective date of the Work-out Agreement was September 1, 1988.

[2] Under the Financial Institutions Reform, Recovery, and Enforcement Act, the FDIC succeeded FSLIC as receiver.

[3] The transaction is actually more complicated, but has been simplified for the sake of clarity. First Texas Bank, FSB is the entity that originally acquired the notes

tion agreement with FGB, the receiver retained virtually all of the unsecured liabilities of Gibraltar, including any obligation to fund further the ranch project.

After FGB acquired the relevant notes, Bradley, Gressett, and Circle C repeatedly sought additional funding from FGB. FGB denied any obligation to make such advances; but it chose to fund the ranch project only to preserve the value of the collateral; the funds, however, were advanced only after Bradley Gressett, and Circle C acknowledged that the advances were not a ratification or assumption of Gibraltar's obligations by FGB. During the first six months of 1989, FGB advanced over $5 million to the ranch project in an attempt to preserve its collateral.

Continued funding came to a screeching halt when FGB received the results of an appraisal of the project in mid-1989: according to the appraisal, over $80 million in debt was secured by less than $29 million in collateral. Faced with this deficiency, FGB refused to advance any more funds to the project unless Bradley, Gressett, and Circle C executed letter agreements confirming that they had no claims against FGB and waiving any potential claims. During the year from September 1989 to September 1990, approximately 27 such letter agreements were executed.

Without long-term financing, the Circle C Ranch Development could not survive, and the defendants were unable to satisfy their financial obligations to FGB. FGB filed suit in Texas state court in September 1990 seeking recovery under the interlocking agreements. The defendants answered and asserted various counterclaims against FGB, including fraud, breach of contract, breach of fiduciary duty, and tortious interference with contract.

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from the FSLIC. It later changed its name to First Gibraltar Savings Association, FSB ("FGB"). FGB later changed its name to First Madison Bank, FSB, and is now known as First Nationwide Bank, FSB. As will be discussed, FGB initially filed the instant suit, so for clarity and simplicity, the appellee will be referred to as FGB in this appeal.

The defendants also contended that Gibraltar's insolvency and the appointment of the FSLIC as receiver for the failed bank amounted to a repudiation of the debt. Further, the defendants argued that FGB assumed Gibraltar's funding obligations when it received Gibraltar's assets from the FSLIC.

Nearly three months after the lawsuit was filed in state court, the Joint Venture filed for relief in bankruptcy. After a reorganization plan was confirmed, the Joint Venture executed a release of its claims against Gibraltar, FGB, the FSLIC, and the FDIC.

While the litigation was pending in state court, FGB twice filed motions for summary judgment. The state court denied summary judgment, reasoning that a number of fact issues existed, including whether FGB was actually the holder and owner of the notes and individual guarantees of the defendants. The FDIC intervened in the state action on August 18, 1993, asserting that such intervention was required to protect any interest of the FDIC that might be implicated by the litigation.[4] The FDIC exercised its statutory right to remove the case to federal court under 12 U.S.C. §1819.

In federal district court, the FDIC and FGB each sought summary judgment. The defendants moved to strike the FDIC's intervention and to remand the action to state court. The district court granted summary judgment to FGB, and, as part of that judgment, denied the motion to remand but dismissed the FDIC as a party to the action. The defendants timely appealed, and the FDIC has cross-appealed its dismissal from the case.

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[4] Principally, the FDIC suggests that it had an interest in securing a declaration from the court that it had authority, as receiver, to assign Gibraltar's assets to FGB unencumbered by Gibraltar's unsecured liabilities.

DISCUSSION

I. Removal Jurisdiction and FDIC's Intervention

The defendants contend that the district court erred when it denied their motion to strike the FDIC's intervention and to remand the action to state court. Specifically, the defendants argue at length that because the FDIC had no interest in the lawsuit and was never a proper party to the proceedings, a remand to state court was required. FDIC argues that the district court's decision to dismiss it from the litigation was erroneous. This court reviews for abuse of discretion the district court's denial of the motion to strike the FDIC's intervention. *See, e.g., Nutro Products Corp. v. NCNB Texas Nat'l Bank*, 35 F.3d 1021, 1023 (5th Cir. 1994). Legal issues concerning the existence of federal removal jurisdiction are reviewed de novo by this court. *See, e.g. Halferty v. Pulse Drug Co.*, 864 F.2d 1185, 1188 (5th Cir. 1989). Because the parties' contentions are interrelated, we will discuss them together.

Defendants' argument is difficult to follow, but they seem to assert that FDIC was never a proper party to the case in state or federal court, and that FDIC intervened "collusively" in state court solely to assist FGB by removing the case to federal court. FDIC responds to these assertions and to the district court's order of dismissal with these propositions: (1) the FDIC has an interest in this litigation that entitles it to intervene because the state court sought to adjudicate whether the FDIC had assigned the notes and guarantees to FGB unencumbered by continuing funding obligations; (2) the defendants asserted claims against Gibraltar, and the FDIC is entitled to intervene when claims are brought against a failed bank for which it was appointed receiver; and (3) the FDIC satisfied the criteria for intervention under Fed. R. Civ. P. 24 because it had agreed to indemnify FGB, the acquiring bank.

There is no dispute that when the FDIC originally intervened in the state court litigation, it did so pursuant to Tex. R. Civ.

P. 60, which allows any party to intervene in the proceedings merely by filing pleadings.[5] FDIC was thus a proper party to the case in state court. What provoked FDIC's intervention was the state court's cryptic ruling denying FGB's summary judgment motion and finding certain fact issues, including "whether FGB is the holder and owner of the notes . . . ." The state court also held "that fact issues exist whether the FDIC or [FGB] is owner and holder of the notes and guarantees of the defendants . . . ." These statements appeared to set for trial the issue whether the FDIC still owned the assets,[6] an issue sufficient to warrant the agency's intervention.[7] The defendants' arguments to the contrary are specious.

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[5] Tex. R. Civ. P. 60 provides that "[a]ny party may intervene by filing a pleading, subject to being stricken out by the court for sufficient cause on the motion of any party." The intervening party may, however, be dismissed for sufficient cause on the motion of any other party to the litigation. During oral argument, the defendants conceded that the FDIC's intervention under Rule 60 was proper.

[6] The FDIC argues that the language of the state court opinion drew into question the very authority granted the FDIC by Congress to dispose of receivership assets when federally insured financial institutions fail.

[7] Despite the state court's language intimating the contrary, there is no doubt that the FDIC has statutory authority to sell and dispose of receivership assets. The statute expressly provides that the FDIC may, for example, "take over the assets . . . and conduct all business of the institution," "collect all obligations and money due the institution," and "preserve and conserve the assets and property of such institution." 12 U.S.C. §1821(d)(2)(B)(i), (ii), and (iv). The FDIC may also "place the insured depository institution in liquidation and proceed to realize upon the assets of the institution . . .," including the "transfer [of] any asset or liability of the institution in default . . ." 12 U.S.C. §1821(d)(2)(E), (G)(i)(II). Given this unambiguous statutory language, this court has repeatedly recognized that the FDIC's enumerated powers as receiver are both extensive and discretionary, free from court-imposed restraints. *See, e.g., Ward v. RTC,* 996 F.2d 99, 103-04 (5th Cir. 1993); *281-300 Joint Venture v. Onion,* 938 F.2d 35, 39 (5th Cir. 1991), *cert. denied,* 502 U.S. 1057, 112 S. Ct. 933 (1992); *see also,* 12 U.S.C. §1821(j) (providing that "no court may take any action, except at the request of the Board of Directors by regulation or order, to restrain or affect the exercise of powers or functions of the [FDIC] as a conservator or a receiver").

The more interesting question is whether FDIC remained a real party in interest in the federal court case, or whether the district court properly dismissed it.

FDIC contends that its interest in the litigation also arose from the counterclaims alleged by the defendants. Indeed, to the extent that the counterclaims attack the actions of Gibraltar, they challenge FDIC's interests, if for no other reason than that the agency assumed those liabilities when it purchased Gibraltar's assets.[8] More to the point, the assistance agreement between the FDIC and FGB guaranteed a rate of return on the book value of the loans backed by the federal government; any risk of not ultimately collecting the book value of the loan rested solely with the FDIC, not FGB. Given the agency's obligation to indemnify FGB, the acquiring bank, FDIC had a concrete financial interest in the litigation that would justify its status as a party.[9]

This court has recognized as much, holding that the FDIC is a proper party in lawsuits raising allegations against a failed bank, even when the FDIC's statutory authority to transfer the failed

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[8]Because the FHLBB issued a worthlessness finding declaring Gibraltar Savings insolvent and appointing the FDIC as receiver, any claims against Gibraltar would be valid, if at all, against the receiver alone. *See, e.g., First Indiana Bank, FSB v. FDIC*, 964 F.2d 503, 507 (5th Cir. 1992).

[9]In *Pernie Bailey Drilling Co. v. FDIC*, 905 F.2d 78, 80 (5th Cir. 1990), this court dismissed

> Pernie Bailey's assertion that FDIC is not a party to the case. *The designation of FDIC as a proper party stems in part from its obligation to indemnity NCNB under the terms of the [Purchase and Assumption] Agreement.* After assignment, NCNB became the proper party to sue on the notes, but even so, FDIC is entitled to defend a claim of rescission. Although the notes were assigned before removal, the FDIC remained the proper party to defend all claims for damages against the closed bank.

The defendants read Pernie *Bailey* very narrowly and urge that it merely found the indemnification agreement relevant to the FDIC's right to intervene and did not hold that such an agreement, standing alone, would consistently warrant intervention. But this court need not address whether such an indemnification agreement would always justify FDIC intervention and concludes only that, under the facts of this case, the indemnification agreement supports the conclusion that the FDIC was entitled to participate in this litigation.

bank's assets is not questioned and when the asset has been assigned to a successor bank under a purchase agreement. Hence, the FDIC is entitled to intervene in a lawsuit when claims are made against a failed institution for which the FDIC acted as receiver. *See, e.g., Bank One Texas Nat'l Ass'n v. Morrison,* 26 F.3d 544, 547 (5th Cir. 1994) (whether the FDIC was a proper party "turns on whether Morrison actually stated claims against [the failed bank] in his counter-claim"); *FSLIC v. Griffin,* 935 F.2d 691, 696 (5th Cir. 1991) (FDIC had a right to defend claims against a failed bank where a party asserted four counter-claims against the FDIC as receiver for the failed bank); *Pernie Bailey,* 905 F.2d 78, 80 (5th Cir. .1990) (recognizing that "the FDIC remained the proper party to defend all claims for damages against the closed bank"). *Beighley v. FDIC,* 868 F.2d 776, 779-80 (5th Cir. 1989) (explaining that the FDIC is the proper party to defend claims against the failed bank even after the bank's assets have been assigned).

But the defendants insist that the above authorities are not persuasive because they do not assert any affirmative claim for relief against Gibraltar, the FSLIC, or the FDIC. This attempt to distinguish the caselaw is both misleading and unavailing. In their Fifth Amended Answer and Sixth Amended Counterclaim filed in state court and reasserted in federal district court, the defendants do describe and allege various acts and omissions of Gibraltar. For instance, the defendants assert that their obligations under the loan agreements and guarantees are somehow excused as a result of

> Gibraltar Savings Association's (the Plaintiffs' predecessor-in-interest) prior material breaches of the contracts at issue. Gibraltar . . . was closed and was unable to fulfill its funding obligations under the loan agreements. This failure constitutes a material breach of the loan agreements and preceded any alleged failure of the Defendants to fulfill their obligations under the loan agreements.

The defendants allege further that Gibraltar and the FSLIC either negligently or intentionally prevented their performance of their loan obligations; they contend that

> [i]n order for the Defendants to be able to meet their obligations under the various loan agreements at issue in this case, the Plaintiff and/or Gibraltar Savings, and/or the FSLIC were obligated to fulfill their obligations under these same loan agreements.
>
> They did not do so. As a result, Circle C Ranch was not able to generate the expected profits that all parties realized would be the source of funds used to pay off the indebtedness at issue. Accordingly, the Defendants' ability to perform under these loan agreements was rendered impossible.

(emphasis in original). The allocations against Gibraltar continue, as the defendants suggest that they are excused from performance under the loan agreements "by the breach of Gibraltar savings of its duty of good faith and fair dealing owed to the Defendants." The plain language of the pleadings filed by the defendants in state court and reasserted in federal district court belies their assertion that this lawsuit does not implicate Gibraltar or the FDIC.

Further, in *Morrison,* this court explained that the FDIC can intervene even when the defendant does not assert any counterclaims against the failed bank. *Morrison,* 26 F.3d at 547-48. FDIC intervention is appropriate when, as here, the defendants assert defenses or claims which reference or rely on the actions of the failed bank or its receiver. In *Morrison,* intervention was appropriate because

> [i]nterspersed among his defenses, Morrison challenges the guaranty as having been executed under duress, that there was a failure of consideration and that his signature was obtained by fraud, defenses which clearly go to the actions of [the insolvent] Mbank. The combination of

> allegations in the counter-claim leads us to conclude that the FDIC validly perceived that Morrison was asserting claims against the Mbank receivership estate and that its intervention was proper.

Id. at 547. In the present case, the FDIC reasonably reached a similar conclusion from the language of the defendants' answer and counterclaims.[10]

As in *Morrison,* the FDIC was entitled to be a party in this case; the case was properly removed, and the district court did not abuse its discretion when it denied the defendants' motion to strike FDIC. Also, because federal jurisdiction is assessed at the time of removal, the district court's ultimate dismissal of the FDIC did not affect the court's subject matter jurisdiction. See, *e.g., id.* The disposition of FDIC's appeal to this court adds one last wrinkle to the parties' procedural arguments. Not that this question matters much, but the parties may think it anomalous that after defending FDIC's status as a party in state court and for removal purposes, we will nevertheless affirm its dismissal by the district court. We do this not because the agency's participation was "unnecessary," however, but because, after the district court decided to grant summary judgment for FGB, any threat to FDIC's interests terminated. At that point, FDIC could have followed the route it did in *Morrison, supra,* by withdrawing from the case. The district court did not afford FDIC that option, but FDIC has not sought "reversal" of the dismissal on appeal, instead praying for affirmance of the judgment for FGB. In sum, we may affirm FDIC's dismissal even while disagreeing with the district court's reason for it.

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[10]Because there are other grounds on which to conclude that the FDIC was entitled to intervene in this case, the court need not discuss whether the FDIC also satisfied the criteria for intervention under Fed. R. Civ. p. 24(a)(2).

II. Standing[11]

The district court held that the borrowers lacked standing to raise any claims against FGB. The court also found that Bradley and Gressett, as shareholders and principals of Circle C, could not assert personal claims for wrongs done to the corporation. Moreover, the district court ruled that Circle C had assigned all of its claims to the Joint Venture, which had in turn released FGB as part of its bankruptcy reorganization.

While the district court was correct that Bradley and Gressett do not have standing as shareholders and principals,[12] they do have standing as guarantors of the loans to assert the defenses that would have been available to the borrowers. *See, e.g., Mayfield v. Hicks,* 575 S.W.2d 571, 574 (Tex. App. — Dallas 1978, writ ref'd n.r.e.) (recognizing that in Texas the general rule is that "guarantors have the right to raise any defenses to the guaranteed obligation that the principal may have."); *Stephens v. First Bank & Trust of Richardson,* 540 S.W.2d 572 (Tex. App. — Waco 1976, writ ref'd n.r.e.).

Circle C, by contrast, does not have standing to assert any claims against FGB. Circle C assigned all of its rights under the loan agreements to the Joint Venture. The language of the assignment was sweeping and divested Circle C of all of its interests and rights, transferring these to the Joint Venture.[13] For

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[11] Our discussion here is limited only to the issue of standing; whether the defendants have waived claims which they would otherwise have standing to raise will be discussed separately.

[12] *See, e.g., Wingate v. Hajdik,* 795 S.W.2d 717, 719 (Tex. 1990) (holding that "[a] corporate stockholder cannot recover damages personally for a wrong done solely to the corporation, even though he may be injured by that wrong").

[13] The defendants urge that even though the Joint venture owns all of Circle C's interest in the loans and project, the Joint venture would somehow not own Circle C's claims for fraudulent inducement or for violations of the other duties alleged by the defendants. The defendants cite no authority for this proposition and it is contradicted by the sweeping language of the assignment agreement. While Circle C could have expressly provided in the assignment agreement that the right

instance, when the Joint Venture accepted the assigned assets, it did so pursuant to a clause stating

> subject to all the liabilities and obligations incurred in connection with the Assets as they exist on the date hereof, whether fixed, contingent, known or unknown, including, but not limited to, the satisfaction of any judgment, order, or decree which may be entered against [Circle C] in any pending suit as a result of such liabilities and obligations. Nothing contained in this Assignment shall, or shall be construed to, prejudice the right of [the Joint Venture] to contest any claim or demand *as fully as [Circle C] might have done [before the Assignment]*.

(emphasis added). Moreover, as was previously discussed, the Joint Venture later filed for bankruptcy and released its claims against FGB as part of its plan for reorganization. As a result, the district court correctly observed that Circle C lost standing to raise claims against FGB when it assigned its entire interest in the loan agreements and project to the Joint Venture; if the Joint Venture could have asserted any claims against FGB prior to bankruptcy, those claims now belong to the bankruptcy estate and have been released.[14]

III. Waiver

Because only Bradley and Gressett have standing as guarantors of the loans to assert the defenses that would have been available to the borrowers, this court must now consider whether Bradley and Gressett have waived their rights to assert such defenses.

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to assert its claims for these alleged violations was retained by Circle C rather than assigned to the Joint Venture, no such provision is found in the agreement.

[14] The defendants counter that Circle C explicitly reserved its right in the bankruptcy release to assert certain claims. This argument is not meaningful, however, because Circle C no longer has standing to raise any affirmative claims against FGB.

The district court found that Bradley and Gressett had repeatedly waived the defenses and counterclaims that they attempted to assert. Specifically, the court found that Bradley and Gressett waived these claims against Gibraltar in both the Work-out Agreement and a Fourth Loan Modification, executed on November 3, 1988. Further, the court found that Bradley and Gressett had waived their claims and defenses against FGB in at least 27 letter agreements that FGB required them to execute before it advanced funds to preserve the value of the collateral.

The defendants disagree, contending that they have specifically reserved their rights to raise the instant claims and defenses. At oral argument, the defendants were willing to concede only that they waived all claims and defenses prior to November 3, 1988.

The defendants' contention is only partially correct. There is no doubt that the defendants waived all claims and defenses prior to November 3, 1988. The Work-out Agreement expressly provides in §11.3 that Bradley and Gressett waive "any and all such offsets, claims, defenses or counterclaims" of "any nature whatsoever . . . to any of the terms, conditions or provisions" of their Personal Note and loan agreement. Additionally, in connection with the fourth loan modification, Bradley and Gressett executed a guarantor's ratification agreement in which they

> represent[ed] and warrant[ed] to Lender that as of the date of this Guarantor's Ratification there exists no offset, claim, defense or counterclaim of any nature whatsoever to any of the terms, conditions of provisions of the Guaranty and . . . to the extent such offsets, claims, defenses or counterclaims do exist, Guarantor hereby expressly and knowingly waives any and all such offsets, claims, defenses or counterclaims.

This language speaks for itself.

When FGB purchased Gibraltar's assets from the FDIC, it refused to advance funds to the defendants to preserve the value

of the collateral unless the defendants executed a letter agreement acknowledging that FGB did not have a continuing obligation to fund the project; 27 such letter agreements were executed between September 27, 1989 and September 25, 1990. The agreements provided that "FGB has not assumed any responsibility or liability for performance of the obligations of [Gibraltar] under the Loan Documents *including, without limitation, the obligations of the Closed Association to fund the loan described in the Loan Documents.*"[15] The letter agreements also state that

> the Borrower and the . . . *Guarantors each waives and releases any and all offsets, claims, defenses, or counterclaims of any nature whatsoever which any off them has or may have against [FGB],* provided, however, that the Borrower and the undersigned Guarantors *reserve any defense or offset* (but not any other claims or rights) with respect to the enforceability of the Loan Documents now held by [FGB] *arising from the acts or omissions of the*

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[15]See Letter from FGB to Defendants, dated September 25, 1989, and signed by the defendants on September 27, 1989 (emphasis added) at 2. The relevant provisions in the remaining 26 letters are virtually identical.

Indeed, any suggestion that FGB had a continuing obligation to fund the project is frivolous; the agreement provides that

> (I) no such action shall be deemed or construed, whether by operation of law, the principles of equity or otherwise, as an assumption by or agreement of [FGB], or a course of dealing which obligates [FGB], to keep, perform, or observe the responsibilities, obligations and covenants, express or implied of [Gibraltar) under the Loan Documents, (ii) [FGB] has no such obligation to the Borrower, the Guarantors or any other party in respect to the Loan Documents, (iii) neither the Borrower nor such Guarantors will assert as a result of the execution of the partial release(s) described in this letter or the negotiations and conversations between [FGB), the Borrower and such Guarantors in respect thereto, whether at law or in equity, that [FGB] has assumed such obligations or is otherwise responsible in any manner for the performance of the obligations, covenants and agreements of the closed Association described in the Loan Documents including, without limitation, the commitment to loan funds as described in said instruments . . .

Id. at 2-3.

> *Closed Association or of the FSLIC, acting in its capacity as receiver of the Closed Association, or any successor of the FSLIC acting in that same capacity* (acknowledging, without prejudice, that [FGB] denies both the existence of all such defenses or offsets and the applicability thereof to the enforceability of the Loan Documents in the hands of [FGB], and [FGB] expressly reserves all rights to deny, challenge and defend against any such defense or offset . . . .

Id. at 3 (emphasis added). Under these provisions, Bradley and Gressett waived their claims against FGB and reserved only those defenses or offsets arising from the acts of Gibraltar, the FSLIC, or the FDIC. However, as FGB correctly argues, given the fact that Bradley and Gressett waived their claims against FGB and that they expressly and unequivocally acknowledge that FGB has no obligation to them to fund the project, the rights reserved by Bradley and Gressett against Gibraltar, the FSLIC, or the FDIC would be meaningful only in a lawsuit against those entities; these rights are irrelevant in the instant case.

Careful review of the record thus demonstrates that Bradley and Gressett waived not only all of their claims prior to November 3, 1988, but also their claims against FGB; hence, Bradley and Gressett have waived all of their claims except during the period from November 4, 1988 to December 28, 1988, the date that FGB acquired Gibraltar's assets.

Recognizing that the letter agreements otherwise destroy the viability of their claims against FGB, the defendants suggest that these agreements are somehow the product of "economic duress." They contend that they were in a "dire situation" and that "[t]hey were therefore, out of fear of economic loss, forced to accept whatever FGB would give them, on whatever terms FGB required." This argument is unsupported by either the law or the

record. In *Lee v. Wal-Mart Stores, Inc.*, 943 F.2d 554, 560 n.11 (5th Cir. 1991), this court explained that

> [t]he test for [economic] duress [under Texas law] includes the following factors: (1) there can be no duress unless there is a threat to do some act which the party threatening has no legal right to do; (2) there must be some illegal exaction or some fraud or deception; (3) the restraint must be imminent and such as to destroy free agency without present means of protection. Further, economic duress can be claimed only when the party against whom it is claimed was responsible for a claimant's financial distress.

(citations omitted); *see also Callum Highlands, Ltd. v. Washington Capital Dus, Inc.*, 66 F.3d 89 (5th Cir. 1995). FGB had a legal right to condition any further funding to preserve the project's capital on execution of the letter agreements. Defendants offered no evidence that FGB exacted these agreements through fraud or deception or that the defendants were otherwise forced or coerced into executing the agreements twenty-seven times. Finally, the defendants' financial woes began long before the executed any agreement with FGB; FGB was not responsible for the defendants' financial distress.

Because the defendants have waived all of their claims against FGB, this court need not address the merits of the various claims for breach of the lending agreements, breach of fiduciary duty, fraud, estoppel, etc.

CONCLUSION

For the foregoing reasons, the judgment of the district court granting summary judgment in favor of FGB and dismissing the FDIC as a party, is AFFIRMED.

No. 95-20500

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

FIRST GIBRALTAR BANK, FSB;

Plaintiff — Appellee

FEDERAL DEPOSIT INSURANCE CORPORATION,
AS RECEIVER FOR GIBRALTAR SAVINGS ASSOCIATION

Intervenor Plaintiff — Appellee-Cross-Appellant

v.

GARY L. BRADLEY; JAMES D. GRESSETT;
CIRCLE C DEVELOPMENT CORPORATION

Defendants — Intervenor Defendants — Appellants-Cross-Appellees

Appeals from the United States District Court for the Southern District of Texas, Houston

ON SUGGESTION FOR REHEARING EN BANC

(Opinion _____, 5 Cir. _____, _____, F.3d _____)

Before JONES, SMITH and STEWART, Circuit Judges.

PER CURIAM:

☒ Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

☐ Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ EDITH H. JONES

United States Circuit Judge

United States District Court

SOUTHERN DISTRICT OF TEXAS

FIRST GIBRALTAR BANK, FSB,
Plaintiff,
v.
GARY L. BRADLEY, JAMES D. GRESSETT, AND CIRCLE C DEVELOPMENT CORPORATION,
Defendants,
FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR GIBRALTAR SAVINGS ASSOCIATION,
Intervenor.

CIVIL ACTION H-93-2558

OPINION ON SUMMARY JUDGMENT

1. Introduction.

A bank wants to recover against the borrowers on a series of loans that it acquired from the receiver of a defunct bank. The borrowers assert contractual breaches by the dead bank as defenses to the debt. The bank can recover from the borrowers free from the obligations of the predecessor institution.

The FDIC has unnecessarily intervened, and both the FDIC and the bank have moved for summary judgment.

2. Background.

In 1985, Circle C Development Corporation (Circle C) and its principals, Gary L. Bradley and James D. Gressett, entered into a series of loan agreements with Gibraltar Savings Associa-

tion (Gibraltar) for development of the Circle C Ranch, near Austin. Circle C was the borrower on these four loans: Land Note, Amenities Note, Phase I Development Note, and Phase II Development Note. Bradley and Gressett individually guaranteed 20 percent of Circle C's notes. Also, Bradley and Gressett were the borrowers under the fifth loan (Personal Note).

In June 1988, Gibraltar declared a default on the Personal Note because Bradley and Gressett missed their interest payment. At the same time, Circle C was in default under the Phase I Note because it had not paid the interest due on it. Gibraltar agreed to reinstate the Personal Note and to modify the agreements with Circle C; in these agreements, Gibraltar rescinded the acceleration of the notes; conversely, Circle C, Bradley, and Gressett reaffirmed their obligations.

Then on December 1, 1988, Bradley and Gressett again missed an interest installment on the Personal Note. Because all of the Circle C notes had cross-default clauses, the default under the Personal Note precipitated a default in all the notes.

On December 27, 1988, the Federal Home Loan Bank Board declared Gibraltar insolvent, appointing FSLIC receiver. By this time, Gibraltar had lent approximately $90 million for Circle C Ranch. FSLIC and First Texas Bank agreed that FSLIC would assign to First Texas Bank the assets of Gibraltar and FSLIC, in general, would retain Gibraltar's unsecured liabilities. Later, the FDIC replaced FSLIC as receiver of Gibraltar.

First Texas Bank changed its name to First Gibraltar Bank, and then changed its name again to become First Madison Bank (Madison).

After Gibraltar's collapse, Circle C, Bradley, and Gressett made no payments on the promissory notes. Madison advanced funds to Circle C, Bradley, and Gressett to protect the value of the collateral, and Madison made it clear in writing that these advances did not evince an acceptance of Gibraltar's obligations.

On September 19, 1990, Madison sued in state court to collect on the five notes, and Circle C, Bradley, and Gressett counterclaimed for the breaches of the original obligations of the lender. The FDIC intervened in 1993 and removed the action.

3. Defaults.

After Bradley and Gressett executed the last reinstatement agreement, in November of 1988, they defaulted again within a month. They failed to pay the interest due on December 1, 1988. In November, they had agreed to cross-defaults between the Personal Note and the four Circle C notes. With the universal default, Bradley, Gressett, and Circle C were in default on all their notes after December 1, 1988. Gibraltar's obligation to advance additional funds stopped the moment one of the loans was in default.

Bradley, Gressett, and Circle C argue that Gibraltar defaulted first by not making further advances when properly requested. Assuming the bank had actually breached its obligations at one of the earlier performance dates, the reinstatement agreement relinquished the claims of Bradley, Gressett, and Circle C against Gibraltar for default from failure to have made later advances under the land note. The borrowers can show no default by Gibraltar between the reinstatement agreement and its collapse.

4. Liability of Madison for Gibraltar.

On December 27, 1988, FSLIC seized Gibraltar and assigned part of its assets to Madison. The unsecured liabilities, though, stayed with the liquidator. Bradley, Gressett, and Circle C have tried to recover from Madison for Gibraltar's failure to advance additional funds. Contractual claims arising from defaults occurring before the collapse of the original bank must be brought against the receivership unless another entity has expressly assumed that liability. The claims against Gibraltar did not pass to Madison with the assets under the acquisition agreement with FSLIC. *First Indiana Federal Sav. Bank v. F.D.I.C.*, 964 F.2d

503, 506(5th Cir. 1992). Their only recourse is to seek redress against Gibraltar's receiver, and they did not seek that relief. Indeed, the borrowers have not asked for permission to sue the FDIC even after it intervened. Madison is only responsible for it's performance of obligations that it acquired from the FSLIC; Madison's failures must be those arising after the transfer of the assets to it. In this case, of course, Madison neither bought nor assumed the burdens of Gibraltar to advance funds must less to answer for Gibraltar's various other wrongs.

5. Standing.

Bradley, Gressett, and Circle C do not have standing to assert claims against Madison arising from the contracts. As shareholders and principals, Bradley and Gressett cannot assert personal claim for wrongs done to the corporation. *Wingate v. Hajdik*, 795 S.W.2d 717, 719 (Tex. 1990). The claims they assert against Madison arise from the development notes, executed by Circle C, not Bradley and Gressett. Further, Circle C itself assigned all of its rights under the agreements to Circle C Development Joint Venture, and as part of bankruptcy, the venture released all its claims against Madison; therefore, Circle C has no standing to assert claims against Madison because they belong to the bankruptcy estate and have been released.

6. Defenses and Counterclaims.

Even if Bradley, Gressett, and Circle C had standing, they have repeatedly waived the defenses and counterclaims they now assert. Bradley and Gressett waived claims against Gibraltar when they signed the reinstatement agreement with Gibraltar on November 3, 1998. Additionally, Circle C agreed to the same waiver in the fourth loan modification agreement. These claims were also waived against Madison in several letters of agreement to obtain funding from Madison, even after this suit was filed.

Even if they had not waived them, the claims have no merit. Bradley and Gressett allege economic duress because they were

forced to sign these letters to obtain additional funding. Borrowing short and investing long has its hazards, but the natural consequences of a borrower's own acts cannot be used as duress. The lender was merely exercising its lawful rights to refuse to advance further funds, so there is not duress as a matter of law. Asking a borrower to live up to his promise or asking for consideration for the delivery of funds cannot be duress. *Simpson v. MBank Dallas, N.A.*, 724 S.W.2d 102, 109 (Tex.App.—Dallas 1987, writ ref'd n.r.e.).

Additionally, they claim Madison owes them a fiduciary duty. Even if there were a fiduciary relation between the bank and borrower, there is no common law duty to advance funds. Similarly, there is no common law duty on the fiduciary not to require performance of the beneficiary's obligations, like conditions precedent. The deal between a lender and borrower does not crease a fiduciary duty. *In re Letterman Bros. Energy Securities Litigation,* 799 F.2d 967, 975 (5th Cir. 1986).

7. Intervention.

The FDIC intervened in this suit between Madison and Bradley, Gressett, and Circle C, even though the FDIC has no interest in this action. No one sued the FDIC as receiver or otherwise. Bradley, Gressett, and Circle C did not seek any relief from the estate of Gibraltar. The FDIC seeks an anticipatory declaratory judgment that it should not be part of this dispute, and the FDIC is correct, it should not be involved. The FDIC complicated the action and wasted everyone's money by intervening unnecessarily. The FDIC is dismissed from this action.

8. Conclusion.

Judgment will be granted in favor of Madison against Bradley, Gressett and Circle C.

On August 19, 1993, Circle C owed Madison:

A. On the Land Note:.

(1) $45,558,662.33 principal and
(2) $34,189,444.11 interest.

B. On the Phase I Development Note:

(1) $1,895,305 principal and
(2) $995,179.88 interest.

C. On the Phase II Note:

(1) $1,687,230.51 principal and
(2) $1,725,226.76 interest.

D. On the Amenities Note:

(1) $3,677,986.41 principal and
(2) $1,765,830.42 interest.

On December 1, 1988, Bradley and Gressett, as guarantors were jointly and severally liable for 20 percent of the Circle C's notes. They owe Madison:

A. On the Land Note:

(1) $13,563,777.99 principal and
(2) $276,559.95 interest.

B. On the Phase I Note:

(1) $379,061 principal and
(2) $7,854.99 interest.

C. On the Amenities Note:

(1) $240,990.96 principal and
(2) $4,061.60 interest.

D. On the Phase II Note:

(1) $1,390,440.27 principal and
(2) $28,379.11 interest.

Bradley and Gressett, on August 19, 1993, were jointly and severally liable for $15,000,00 principal and $8,108,945.83 interest on the Personal Note.

If the parties cannot agree to the interim interest and to attorney fees, a hearing will be held:

Monday, June 19, 1995, at 1:30 pm
Courtroom 11-C
515 Rusk Avenue, Houston, Texas 77002.

The FDIC will be denied its request for summary judgment and dismissed from this suit.

Signed May 12, 1995, at Houston, Texas.

/s/

LYNN N. HUGHES
United States District Judge

United States District Court

SOUTHERN DISTRICT OF TEXAS

FIRST MADISON BANK, FSB, FSB, Formerly known as FIRST GIBRALTAR BANK, FSB *Plaintiff,* v. CIRCLE C DEVELOPMENT, *et al.,* *Defendants.*	CIVIL ACTION H-93-2558

FINAL JUDGMENT

Under the opinion signed May 12, 1995:

1. First Madison Bank, FSB (ex-First Gibraltar Bank, FSB) (First Madison) recovers from Circle C Development Corporation:

A. On the Land Note:

(1) $46,558,662.33 principal,

(2) $34,189,444.11 interest at the contract rate from December 1, 1988, through August 19, 1993, and

(3) $ 8,101,530.64 interest at the contract rate from August 20, 1993, through June 19, 1995.

B. On the Phase I Development Note:

(1) $ 1,895,305.00 principal,

(2) $ 995,179.88 interest at the contract rate from December 1, 1988, through August 19, 1993, and

(3) $ 329,796.20 interest at the contract rate from August 20, 1993, through June 19, 1995.

C. On the Phase II Development Note:

(1) $ 1,687,230.51 principal;

(2) $ 1,725,226.76 interest at the contract rate from December 1, 1988, through August 19, 1993, and

(3) $ 293,589.72 interest at the contract rate from August 20, 1993, through June 19, 1995.

D. On the Amenities Note:

(1) $ 3,677,986.41 principal,

(2) $ 1,765,830.42 interest at the contract rate from December 1, 1998, through August 19, 1993, and

(3) $ 639,995.22 interest at the contract rate from August 20, 1993, through June 19, 1995.

2. First Madison recovers from Circle C Development Corporation, $16,444.75 per diem on those notes collectively, at the contract rate from June 20, 1995, until entry of this judgment.

3. On December 1, 1988, Gary L. Bradley and James D. Gressett, as guarantors, were jointly and severally liable for 20 percent of Circle C Development Corporation's notes. First Madison recovers from Gary L. Bradley and James D. Gressett as guarantors:

A. On the Land Note:

(1) $13,563,777.99 principal,

(2) $ 276,559.95 interest as of December 1, 1988, and

(3) $ 9,201,139.59 interest from December 1, 1988, to June 19, 1995.

B. On the Phase I Note:

(1) $ 379,061.00 principal,

(2) $ 7,854.99 interest as of December 1, 1988, and

(3) $ 257,140.08 interest from December 2, 1988, to June 19, 1995.

C. On the Amenities Note:

(1) $ 240,990.96 principal,

(2) $ 4,061.60 interest as of December 1, 1988, and

(3) $ 163,479.04 interest from December 2, 1988, to June 19, 1995.

D. On the Phase II Note:

(1) $ 1,390,440.27 principal,

(2) $ 28,379.11 interest as of December 1, 1988, and

(3) $ 943,220.73 interest from December 2, 1988, to June 19, 1995.

4. First Madison recovers from Gary L. Bradley and James D. Gressett, as guarantors, at the contract rate, the sum of $4,758.81 in per diem interest from June 20, 1995, until the entry of this judgment.

5. Gary L. Bradley and James D. Gressett, on August 19, 1993, were jointly and severally liable on the personal note. First Madison recovers from Gary L. Bradley and James D. Gressett on the personal note, jointly and severally:

A. $15,000,000.00 principal,

B. $ 8,018,945.83 interest through August 19, 1993, and

C. $ 2,610,104.05 interest from August 20, 1993, through June 19, 1995.

6. First Madison recovers from Gary L. Bradley and James D. Gressett on the personal note, $4,583.33 per diem at the contract rate from June 20, 1995, until the entry of this judgment.

7. First Madison recovers from Circle C Development Corporation, Gary L. Bradley, and James D. Gressett, jointly and severally, attorneys' fees in these amounts:

A. $192,000.00 — Attorneys' fees incurred related to the bankruptcy of Circle C Development Joint Venture,

B. $116,840.00 — Attorneys' fees incurred for services rendered by the law firm Ogden Gibson & White,

C. $55,900.00 — Attorneys' fees incurred for services rendered by the law firm of Liddell, Sapp, Zivley, Hill & LaBoon, L.L.P. for services rendered before the filing of this lawsuit related to collection efforts,

D. $392,205.00 — Attorneys' fees incurred for services rendered by the law firm of Liddell, Sapp, Zivley, Hill & LaBoon, L.L.P. in this lawsuit.

8. First Madison recovers from Circle C Development Corporation, Gary L. Bradley, and James D. Gressett, jointly and severally, post-judgment interest at 5.53% from the date of judgment until it is satisfied.

9. Costs of court are borne by Circle C Development Corporation, Gary L. Bradley, and James D. Gressett, jointly and severally.

10. The Federal Deposit Insurance Corporation is dismissed from this lawsuit as improvidently intervening.

11. The defendants' motion to remand is denied.

12. All other relief not granted is denied.

Signed June 26th, 1995, at Houston, Texas.

/s/

LYNN N. HUGHES
United States District Judge

No. 96-1276

In the Supreme Court of the United States

OCTOBER TERM, 1996

GARY L. BRADLEY, ET AL., PETITIONERS

v.

FIRST GIBRALTAR BANK, FSB, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

WALTER DELLINGER
Acting Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

WILLIAM F. KROENER, III
General Counsel
JACK D. SMITH
Deputy General Counsel
ANN S. DUROSS
Assistant General Counsel
ROBERT D. MCGILLICUDDY
CHRISTOPHER J. BELLOTTO
Counsel
Federal Deposit Insurance Corporation
Washington, D.C. 20429

QUESTIONS PRESENTED

1. Whether the courts below had subject-matter jurisdiction over this case, which the Federal Deposit Insurance Corporation removed to federal court after it intervened in the original state court action.

2. Whether the courts below properly held petitioners liable for the amounts due on loans made to them by a failed thrift.

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BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is unpublished, but the judgment is noted at 98 F.3d 1338 (Table). The opinion and order of the district court (Pet. App. A19-A30) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 1996. A petition for rehearing was denied on November 12, 1996. Pet. App. A18. The petition for a writ of certiorari was filed on February 7,

1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1985, petitioners entered into several loan agreements with Gibraltar Savings Association (Gibraltar) to fund the proposed development of a planned community near Austin, Texas. Pet. App. A2. Gibraltar eventually advanced nearly $80 million to petitioner Circle C Development Corporation (Circle C) under four promissory notes. Petitioners Bradley and Gressett, who were Circle C's principal shareholders, guaranteed 20% of the corporation's debt and personally borrowed an additional $15 million from Gibraltar under a separate note (the Personal Note). *Ibid.*; Pet. 4. The various notes contained cross-default provisions under which a default on any note would be a default on each of the remaining notes as well. Pet. App. A2.

Petitioners Bradley and Gressett failed to pay the interest due on the Personal Note in May 1988. Pet. App. A2. When petitioners failed to cure the default, Gibraltar accelerated the balance of the note and called for immediate payment. *Ibid.* Petitioners then "restructured" their investment in Circle C, raising more than $1 million in new cash and transferring all of the corporation's interests in the development project to a new entity, Circle C Development Joint Venture (Joint Venture). *Id.* at A3. Joint Venture later released all claims related to the notes as part of a bankruptcy reorganization. *Id.* at A12-A13, A22.

Petitioners Bradley and Gressett also negotiated a "work-out" agreement under which Gibraltar rescinded its declaration of default and acceleration and petitioners reaffirmed their obligations under the

Personal Note. Pet. App. A3. In the agreement, petitioners also waived any "offsets, claims, defenses or counterclaims" they might have had with respect to that note or to their guarantees. *Id.* at A14. On December 1, 1988, petitioners again failed to pay the interest due on the Personal Note, thus causing a default on all of the notes under the cross-default provisions. *Id.* at A3.

2. On December 27, 1988, the Federal Home Loan Bank Board closed Gibraltar and appointed the Federal Savings and Loan Insurance Corporation (FSLIC) to act as its receiver. Pet. App. A3. The FSLIC transferred many of Gibraltar's assets, including the notes and guarantees involved in this case, to respondent First Gibraltar Bank (FGB).[1] Under the acquisition agreement, the receiver retained virtually all of Gibraltar's unsecured liabilities, including any obligation to provide further funds for the Circle C development project. *Id.* at A3-A4.

Petitioners repeatedly sought additional funding from FGB, which denied any obligation to provide it. Pet. App. A4. To protect its collateral, FGB did advance more than $5 million in new funds in the first half of 1989, after petitioners acknowledged that the advances were not a ratification or assumption of any funding obligation owed by Gibraltar. Following an unfavorable appraisal, however, FGB refused to provide additional funds unless petitioners confirmed in writing that they had no claims against FGB and

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[1] FGB, the nominal respondent in this case, was actually the corporate successor to First Texas Bank, the original transferee of the notes. FGB in turn became First Madison Bank, and is now known as First Nationwide Bank. See Pet. App. A3 n.3, A20.

waived any potential claims. Petitioners signed 27 letter agreements to that effect in 1989 and 1990. *Ibid.*

3. In September 1990, FGB filed suit in Texas state court seeking recovery of funds advanced under the various notes. Pet. App. A4. Petitioners asserted various counterclaims, including fraud, breach of contract and fiduciary duty, and tortious interference with contract. *Ibid.* Some of petitioners' allegations were directed at Gibraltar and the FSLIC. *Id.* at A9-A10.[2] Petitioners also argued that Gibraltar's insolvency and the appointment of the FSLIC as receiver amounted to a repudiation of the debt, and that FGB had assumed Gibraltar's funding obligations when it received Gibraltar's assets from the FSLIC. *Id.* at A5.

FGB filed two summary judgment motions, each of which was denied. In November 1992, the state court ruled that a trial would be required to resolve certain factual issues, including whether the notes and guarantees at issue were owned by FGB or by the Federal Deposit Insurance Corporation (FDIC), which had

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[2] Petitioners contended, for example, that:

> In order for [petitioners] to be able to meet their obligations under the various loan agreements at issue in this case, [FGB] and/or Gibraltar Savings, and/or the FSLIC were obligated to fulfill their obligations under these same loan agreements.

Pet. App. A10. Similarly, petitioners claimed they were excused from performance under the loan agreements "by the breach of Gibraltar savings of its duty of good faith and fair dealing owed to [petitioners]." *Ibid.*

succeeded the FSLIC as Gibraltar's receiver. Pet. App. A5, A7.[3]

4. In August 1993, the FDIC (as receiver) intervened in the state court proceeding, in order to protect any of its interests that might be implicated by the litigation. Pet. App. A5. In particular, the FDIC sought a declaration that its predecessor, the FSLIC, had had the authority, as receiver, to assign Gibraltar's assets to FGB free of Gibraltar's unsecured liabilities. See *id.* at A5 n.4. On the same day, the FDIC exercised its right under 12 U.S.C. 1819(b)(2) to remove the case to federal court. *Ibid.*

The FDIC and FGB both moved for summary judgment. Pet. App. A5. In particular, the FDIC asked the district court to rule on the limited legal issues that were the basis for its intervention. See *id.* at A23. Petitioners asked the court to strike the FDIC's intervention and remand the case to state court. *Ibid.*

The district court granted summary judgment for FGB. Pet. App. A19-A25. The court held that petitioners had no standing to assert claims against FGB (*id.* at A22); that FGB had not succeeded to any liabilities of Gibraltar when it acquired petitioners' notes from the FSLIC as receiver (*id.* at A21-A22); that any obligation Gibraltar might have had to advance funds had been either waived by petitioners in their work-out agreement or cut off by petitioners' own default on the notes (*id.* at A21); and that the defenses and counterclaims petitioners sought to

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[3] The Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183, abolished the FSLIC and provided for the FDIC's succession to the FSLIC's function as receiver of failed thrifts.

assert against FGB had similarly been waived and were, in any event, without merit (*id.* at A22-A23). The court denied petitioners' motions to strike the FDIC's intervention and remand the case. *Id.* at A30. The court criticized the FDIC, however, for intervening "unnecessarily," holding laconically that "[t]he FDIC seeks an anticipatory declaratory judgment that it should not be part of this dispute, and the FDIC is correct, it should not be involved." *Id.* at A23.

5. The court of appeals affirmed. Pet. App. A1-A17. The court first considered and rejected (*id.* at A6-A11) petitioners' arguments that federal jurisdiction was lacking because the FDIC was not a proper party to the litigation. The court noted (*id.* at A7) that the FDIC had involved itself in the action only after a ruling by the state court that "appeared to set for trial the issue whether the FDIC still owned" the notes involved in the litigation—an issue that was "sufficient to warrant the agency's intervention." Thus, "the FDIC was entitled to be a party in this case; the case was properly removed, and * * * because federal jurisdiction is assessed at the time of removal, the district court's ultimate dismissal of the FDIC did not affect the court's subject matter jurisdiction." *Id.* at A11.

The court found "more interesting" (Pet. App. A8) the question whether that "ultimate dismissal" (*id.* at A11) was proper. After explaining at some length (*id.* at A8-A11) the FDIC's "concrete financial interest in the litigation" (*id.* at A8) and the propriety of its intervention to defend against claims and defenses involving alleged actions or omissions by Gibraltar or its receiver, the court nonetheless affirmed the dismissal (*id.* at A11). The court made clear, however,

that it "disagree[d] with the district court's reason[ing]," and it affirmed dismissal "not because the agency's participation was 'unnecessary,'" as the district court had thought, "but because, after the district court decided to grant summary judgment for FGB, any threat to FDIC's interests terminated." *Ibid.*

The court proceeded to affirm the grant of summary judgment in favor of FGB. Pet. App. A12-A17. Although it agreed with the district court that petitioner Circle C lacked any standing and that petitioners Bradley and Gressett lacked standing as shareholders and principals of the corporation, the court held that Bradley and Gressett did have standing as guarantors to assert any defenses that would have been available to Circle C as borrower. *Id.* at A12-A13. The court further held, however, that petitioners had waived all of the claims and defenses they now sought to assert, either in the work-out agreement signed in November 1988 or, as against FGB, in the 27 letter agreements signed in connection with FGB's advance of further funds after it acquired petitioners' notes. *Id.* at A13-A17.

ARGUMENT

1. We note, at the outset, that on August 19, 1996, after argument in the court of appeals but before that court had rendered its decision, the FDIC, acting in its corporate capacity (rather than as receiver), acquired from FGB's corporate successor the notes and guarantees at issue in this case. That transaction is not, of course, legally relevant to the question whether there was a proper basis for federal jurisdiction at the time this case was removed from state court. The Court should be aware, however, that re-

spondent FGB (now First Nationwide Bank, see note 1, *supra*) would appear to have no continuing interest in this case. Cf. Sup. Ct. Rules 12.6, 35. If this case proceeds, the FDIC will likely file a motion to substitute itself, in its corporate capacity, for FGB as respondent.

2. Petitioners contend principally (Pet. 7-25) that the federal courts below had no jurisdiction over this matter because the FDIC, as receiver for Gibraltar, never had an interest in the litigation sufficient to satisfy the requirements of Article III of the Constitution. That is incorrect.

The court of appeals noted (Pet. App. A7) that the FDIC intervened in this case only after the state trial court in which it was pending issued an order that "appeared to set for trial the issue whether the FDIC still owned" the notes and guarantees at issue. The court correctly held that that issue alone was "sufficient to warrant the agency's intervention." *Ibid.* In addition, the court properly recognized that (i) petitioners' claims "attack[ing] the actions of Gibraltar," and therefore raising issues of potential liability on the part of the FDIC as Gibraltar's receiver, and (ii) the FDIC's guarantee, in its assistance agreement with FGB, that FGB would realize a given rate of return on the notes, also gave the FDIC "a concrete financial interest in the litigation that would justify its status as a party." *Id.* at A8.[4] Those

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[4] See also *Nutro Prods. Corp.* v. *NCNB Texas Nat'l Bank*, 35 F.3d 1021, 1023 (5th Cir. 1994) (where claims involving a failed bank are brought after assignment of the bank's assets, the FDIC as receiver is a "proper party" entitled to intervene); *Bank One Texas Nat'l Ass'n* v. *Morrison*, 26 F.3d 544, 547 (5th Cir. 1994); *Pernie Bailey Drilling Co.* v. *FDIC*, 905 F.2d 78, 80 (5th Cir. 1990).

adverse interests, put at issue by petitioners through their litigation with FGB and existing at the time of removal to federal court, plainly gave rise to a sufficient "case or controversy" to satisfy the requirements of federal jurisdiction under Article III.

3. Because the FDIC was a proper party to the litigation under Article III, petitioners' further arguments concerning jurisdiction (Pet. 10-14, 18-25) are beside the point. Thus, whether an intervenor that does *not* itself satisfy the requirements for constitutional standing should ever be permitted to intervene in a federal case (see Pet. 10-14) is not at issue here.

Similarly, petitioners' arguments (Pet. 18-25) concerning the applicability and constitutionality of 12 U.S.C. 1819 are inapposite, because they depend on the incorrect premise (Pet. 19; see Pet. 24-25) that the courts in this case allowed the FDIC to "evade" a statutory or constitutional requirement "that the FDIC be a [proper] party." In a case in which the FDIC was otherwise a constitutionally proper party to the litigation, Section 1819(b)(2)(A) provides a sufficient basis to treat the case as one "arising under" federal law and to remove it to federal court.[5] See, *e.g.*, *American Nat'l Red Cross* v. *S.G.*, 505 U.S. 247, 264 (1992) ("Article III's 'arising under' jurisdiction is broad enough to authorize Congress to confer federal-court jurisdiction over actions involving federally chartered corporations."); *Mizuna, Ltd.* v. *Crossland Fed. Sav. Bank*, 90 F.3d 650, 654-657 (2d Cir. 1996); *Buchner* v. *FDIC*, 981 F.2d 816, 818-819

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[5] Section 1819(b)(2)(A) provides that "all suits of a civil nature at common law or in equity to which the [FDIC], in any capacity, is a party shall be deemed to arise under the laws of the United States." 12 U.S.C. 1819(b)(2)(A).

(5th Cir. 1993); *FDIC* v. *Meyerland Co.*, 960 F.2d 512, 517-519 (5th Cir. 1992) (en banc), cert. denied, 506 U.S. 1049 (1993); see also *Brockman* v. *Merabank*, 40 F.3d 1013, 1017-1018 (9th Cir. 1994) (no constitutional defect in parallel provision applicable to the Resolution Trust Corporation).

Finally, there is no basis for petitioners' apparent contention (see Pet. 20-24) that the FDIC was somehow constitutionally required to satisfy the requirements of Federal Rule of Civil Procedure 24, which governs the procedural requirements for intervention in cases pending in federal court. It is undisputed that the FDIC's original intervention in the state court case was procedurally proper under Texas law (see Pet. App. A6-A7), and that the FDIC correctly invoked the procedural mechanisms for removal to federal court. In the federal courts, petitioners have been afforded ample opportunity to advance their arguments concerning the FDIC's lack of constitutional standing. There is no merit to petitioners' contention that the courts below should also have considered the requirements of inapplicable federal procedural rules.[6]

4. Petitioners argue (Pet. 25-26) that the court of appeals' decision conflicts with this Court's decision in *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79 (1994). The court of appeals, however, like the district court (Pet. App. A21-A23), simply construed the releases and waivers that petitioners signed at various times

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[6] At any rate, the FDIC-Receiver meets all of the criteria for intervention under Rule 24(a)(2). See *Arends* v. *Eurobank & Trust Co.*, 146 F.R.D. 42, 48 (D.P.R. 1993) (FDIC interests evident); *Diaz* v. *McAllen State Bank*, 975 F.2d 1145, 1148 (5th Cir. 1992) (Congress clearly provided FDIC right and time to intervene).

and concluded (*id.* at A16) that petitioners had "waived not only all of their claims [including offsets] prior to November 3, 1988, but also [all] their claims against FGB," the party they sued in this proceeding.[7] Contrary to petitioners' contention (Pet. 26), that conclusion does not rely on any "special federal common law rule." The lower courts' resolution of petitioners' claims and defenses concerning liability for the money they borrowed from Gibraltar reflects only the application of routine principles of contract law to particular documents, and nothing in the decisions below merits further review by this Court.

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[7] Even if petitioners were correct that they should have been allowed to assert against any subsequent holder of their notes defenses based on Gibraltar's alleged failure to advance funds as originally agreed (see Pet. 26), and that they did not waive such defenses in their letter agreements with FGB (see Pet. 25), they would have no remaining claim in this case. Both the individual petitioners (see Pet. App. A14) and their corporation (*id.* at A22) waived any offsets or defenses to liability that might have arisen prior to the signing of the work-out agreement on November 3, 1988. After December 1, 1988, when petitioners again defaulted on their notes, Gibraltar had no possible obligation to continue to advance funds. *Id.* at A21; see also *id.* at A16 (petitioners have waived all claims "except during the period from November 4, 1988 to December 28, 1988," when Gibraltar failed and FGB acquired the notes). Yet petitioners nowhere dispute the district court's finding (*id.* at A21) that they "can show no default by Gibraltar between the reinstatement agreement [on November 3, 1988] and [Gibraltar's] collapse." There remains no valid defense to liability on the notes that petitioners could assert against any party in any litigation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

WILLIAM F. KROENER, III
General Counsel
JACK D. SMITH
Deputy General Counsel
ANN S. DUROSS
Assistant General Counsel
ROBERT D. MCGILLICUDDY
CHRISTOPHER J. BELLOTTO
Counsel
Federal Deposit Insurance Corporation

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NO. 96-1276

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

GARY L. BRADLEY, JAMES D. GRESSETT, AND
CIRCLE C DEVELOPMENT CORPORATION
Petitioners,

v.

FIRST GIBRALTER BANK, FSB AND
FEDERAL DEPOSIT INSURANCE CORPORATION,
AS RECEIVER FOR GIBRALTER SAVINGS
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

Of Counsel:

PHILLIP T. BRUNS
PAUL J. DOBROWSKI
BARRETT H. REASONER
JENNIFER HORAN GREER

ROBIN C. GIBBS
Gibbs & Bruns, L.L.P.
1100 Lousiana Street #5300
Houston, Texas 77002
Telephone: (713) 650-8805
Facsimile: (713) 750-0903

Counsel of Record

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I. Summary of the Argument

The FDIC's Brief in Opposition to the Defendants' Petition for Writ of Certiorari is more notable for what it does not say than for what it does.[1]

The FDIC implicitly admits that federal jurisdiction under Article III does not exist in this case if the FDIC had no interest in the state court suit. That is, the FDIC does not dispute that an intervenor must independently satisfy the requirements of Article III. Nor does the FDIC dispute that § 1819(b)(2)(A) and (B) cannot be read to create Article III jurisdiction when the FDIC's intervention presents no case or controversy arising under federal law. Nor does the FDIC dispute that § 1819 is unconstitutional if it can be read in such a manner. Instead, the FDIC focuses its argument solely on whether the FDIC had an interest in the case. None of the three purported "interests" on which the FDIC relies supports Article III jurisdiction.

Similarly, the FDIC does not dispute that it could assign no greater rights to its assignee, the Bank, than the FDIC itself possessed. See FDIC Br. 10-11.[2] Instead, the FDIC attempts to rewrite the Fifth Circuit's opinion to hold that the Defendants waived all of their claims and defenses against the Bank. To the contrary, the Fifth Circuit plainly held that although the Defendants waived their claims against the Bank, they specifically reserved any defenses or offsets arising from the actions of the failed bank and its receivers. Nevertheless, the Fifth Circuit erroneously refused to apply state law on assignments, under which the FDIC could not have assigned any greater rights in the notes and guarantees at issue in this case than the FDIC itself possessed.

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[1]Abbreviations used in this brief are the same as those used in the Petition for Writ of Certiorari.

[2]References to "FDIC Br." are to the Brief for the Federal Deposit Insurance Corporation in Opposition.

II. Federal Jurisdiction Does Not Exist in this Case

The FDIC makes only one argument as to why federal jurisdiction supposedly exists in this case: it claims the FDIC had an "interest." *See* FDIC Br. 8-10. However, none of the three alleged "interests" on which the FDIC relies supports Article III jurisdiction.

First, the FDIC contends that it had an interest because the state trial court supposedly questioned the FDIC's authority to transfer assets of failed banks. FDIC Br. 4-5, 8. Notably, the FDIC does not cite the state court's order in support of its argument. *See id.* This is most likely because the state court never questioned the FDIC's *authority* to transfer assets. *See* R. 3509-3508. Rather, the state court merely held that a fact issue existed as to whether the notes and guarantees at issue in this case were *in fact* transferred to the Bank. *See id.* In so holding, the state court simply recognized that the testimony of the Bank's chairman and chief executive officer created a fact issue as to whether ownership of the agreements was ever transferred to the Bank:

> A: . . . We understood under the [acquisition] agreement that we would be an asset manager and that we would be working with the appropriate regulatory authorities in that regard. . . .
>
> Q: When you say you recognized you would be an asset manager, what -- what do you mean by that term?
>
> A: Well, we -- we basically managed the assets for what would be the beneficial owner, in this case, FSLIC, and that we would be required to manage them in -- in a fashion in which we would operate them in a way that would be efficient for the -- *the owner, which in this case was FSLIC.*

Tr. 1445-1443. In any event, the question whether *the FDIC* owned the notes was irrelevant to the issues before the state court. The issue was whether the Bank was entitled to summary judgment on the

notes and guarantees, despite the fact that it had denied owning the agreements at issue. The state court in no way suggested that it could somehow impose ownership of the notes on the FDIC. *See* R. 3509-3508. Nor did the Plaintiffs or the Defendants seek to impose any liability whatsoever on the FDIC. *See* R. 3372-3367, 3360-3351, 3234, 3232-3218. Indeed, it is difficult to discern how the FDIC's interests were at stake in the lawsuit at all, since the FDIC was not a party and therefore could not be bound by any order of the state court. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969). Accordingly, the state court's order could not have conferred on the FDIC an interest in this case.

Second, the FDIC argues that it had an interest in the case because the Defendants supposedly attacked the actions of the failed bank, "therefore raising issues of potential liability on the part of FDIC as Gibraltar's receiver." FDIC Br. 8. Once again, the FDIC fails to cite the actual pleadings filed in this case to support its argument. As a review of the pleadings shows, the Defendants never asserted claims or defenses against the FDIC or the failed bank for which it served as receiver. *See* R. 3234, 3232-3218. Nor has the Bank ever asserted such claims. *See* R. 3372-3367, 3360-3351. In a footnote, the FDIC apparently argues, as it did in the Fifth Circuit, that the mere mention of a failed bank in a pleading creates federal jurisdiction. *See* FDIC Br. 8 n.4; Reply Brief of the Appellee and Cross-Appellant, the Federal Deposit Insurance Corporation, as Receiver for Gibraltar Savings Association at 2-5 (filed in the Fifth Circuit on January 31, 1996); *see also* FDIC Br. 4. Once again, the mere mention of the failed bank and its receiver conferred no interest on the FDIC: the FDIC had not been sued and therefore could not have been bound by any judgment.[3] *See Zenith*, 395 U.S. at 110.

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[3]Moreover, the cases on which the FDIC relies do not support its position. *See* FDIC Br. 8 n.4 (citing *Nutro Prods. Corp. v. NCNB Texas Nat'l Bank*, 35 F.3d 1021, 1023 (5th Cir. 1994); *Bank One Texas N.A. v. Morrison*, 26 F.3d 544, 547 (5th Cir. 1994); *Pernie Bailey Drilling Co. v. FDIC*, 905 F.2d 78, 80 (5th Cir. 1990)). In *Morrison* and *Pernie Bailey*, the borrowers did not merely mention the actions of the failed bank, but rather actually asserted claims for damages against the failed

Third, the FDIC argues that the FDIC's guarantee that the Bank would realize a given rate of return on the notes gave the FDIC an interest in the litigation. FDIC Br. 8. But the FDIC does not dispute that such an indirect, consequential interest cannot support standing. *See Penda Corp. v. United States*, 44 F.3d 967, 972 (Fed. Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1962 (1995); Pet. 16-17. Nor does the FDIC dispute that it has never pleaded or proved that the success of the Defendants' defenses would actually -- or even probably -- push the book value of the loans below the rate of return guaranteed to the Bank. Any interest the FDIC has by virtue of its guarantee is therefore merely hypothetical and cannot support a finding of Article III standing.[4] In sum, none of the FDIC's claimed "interests" in this case can withstand even passing scrutiny.

The cases cited by the FDIC do not support the existence of federal jurisdiction in this case. *See* FDIC Br. 9-10 (citing *American Nat'l Red Cross v. S.G.*, 505 U.S. 247, 264 (1992); *Mizuna, Ltd. v. Crossland Fed. Sav. Bank*, 90 F.3d 650, 654-657 (2d Cir. 1996); *Buchner v. FDIC*, 981 F.2d 816, 818-819 (5th Cir. 1993); *FDIC v. Meyerland Co.*, 960 F.2d 512, 517-519 (5th Cir. 1992) (en banc),

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bank. *See Morrison*, 26 F.3d at 547; *Pernie Bailey*, 905 F.2d at 79, 80. Although *Nutro Products* is unclear as to exactly what the defendants' pleadings alleged, the court cited *Pernie Bailey* for the proposition that the FDIC is a proper party "in cases involving *claims for damages against [a] failed bank* . . . ." 35 F.2d at 1023 (emphasis added). To the extent that these Fifth Circuit cases can be read to support the FDIC's position, the cases, like the Fifth Circuit's opinion in this case, are simply wrong.

[4]Blatantly stepping outside the record, the FDIC also argues that it has, in its corporate capacity, acquired the notes and guarantees at issue in this case. *See* FDIC Br. 7. The FDIC, however, admits that this argument is irrelevant and cites nothing in the record to support this argument. *See id.* This unsupported, admittedly irrelevant argument is yet another attempt by the FDIC to manipulate federal court jurisdiction and should be disregarded. *See* S. Ct. R. 24.6.

cert. denied, 506 U.S. 1049 (1993); *Brockman v. Merabank*, 40 F.3d 1013, 1017-1018 (9th Cir. 1994)). These cases merely hold that Congress may confer Article III jurisdiction over actions involving federally chartered corporations. None of these cases holds that federal jurisdiction is proper over actions in which the federally chartered corporation has no interest in the case. *See id.* Indeed, one of the cases cited by the FDIC specifically reserved the question of whether the presence of the FSLIC would be insufficient to confer federal jurisdiction in a controversy unrelated to the FSLIC. *See Brockman*, 40 F.3d at 1016.

The FDIC, moreover, is simply incorrect when it asserts that it was not required to meet the requirements for intervention under Rule 24 of the Federal Rules of Civil Procedure because "[i]t is undisputed that the FDIC's original intervention was procedurally proper under Texas law." FDIC Br. 10. The Defendants have never conceded that the FDIC's original intervention was proper under Texas law. Rather, the Defendants have consistently pointed out that Texas intervention procedure requires two steps: (1) the intervenor files a petition in intervention, and (2) the other parties in the case are then permitted to test the propriety of the intervention by filing motions to strike the intervention, at which time the court engages in an analysis similar to that performed under the Federal Rule 24. *See* Tex. R. Civ. P. 60. The FDIC circumvented the second step by removing the case immediately after it filed its petition in intervention. Its intervention under Texas procedure was therefore incomplete and improper. *See id.* Because the propriety of the FDIC's intervention was never considered -- either by a state or federal court -- it is not properly "a party" to the case under § 1819(b)(2)(A) and (B), the only alleged basis for federal jurisdiction in this case. Accordingly, the Fifth Circuit's refusal to require the FDIC to meet the requirements for intervention permits the FDIC to evade the Article III requirement of a "case" or "controversy" "arising under" federal law.

III. The Court of Appeals' Holding Improperly Allows the FDIC to Assign Greater Rights than It Possessed

In their Petition, the Defendants argued that the Fifth Circuit created a special federal common-law exception to state law governing assignment when it held that the Bank is not subject to defenses arising out of the actions of the failed bank, the FSLIC, and the FDIC. Pet. 25-26. In response, the FDIC does not dispute that it could assign no greater rights to its assignee, the Bank, than the FDIC itself possessed. *See* FDIC Br. 10-11. Instead, the FDIC ignores a portion of the Fifth Circuit's opinion that allowed the FDIC to do just that, and incorrectly implies that the Fifth Circuit held only that the Defendants waived their defenses against the Bank. *See id.* A careful reading of the opinion reveals the FDIC's error.

The FDIC observes that the Fifth Circuit stated that the Defendants had waived their claims prior to November 3, 1988, as well as their "claims" against the Bank. FDIC Br. 10-11; Pet. A16. The FDIC argues that this holding also means that the Defendants waived all defenses against the Bank. This portion of the Court of Appeals' opinion, however, addresses only waiver of "claims" -- not waiver of defenses or offsets. *See* Pet. A16. If the FDIC had reported the rest of the Fifth Circuit's holding, it would have noted that the Court of Appeals further held that the Defendants *reserved* their *defenses and offsets* arising from the acts of the failed bank, the FSLIC, and the FDIC. *Id.* The Court also held, however, that the FDIC somehow assigned to the Bank the right to recover on the notes and guarantees free of these defenses:

> Under these provisions, Bradley and Gresset waived their *claims* against FGB and *reserved only those defenses or offsets arising from the acts of Gibraltar, the FSLIC, or the FDIC.* However, as FGB correctly argues, given the fact that Bradley and Gressett waived their claims against FGB and that they expressly and unequivocally acknowledge that FGB has no obligation to them to fund the project, *the rights reserved by Bradley and Gressett against*

> *Gibraltar, the FSLIC, or the FDIC would be meaningful only in a lawsuit against those entities; these rights are irrelevant in the instant case.*

Pet. A16.[5] Thus, under the Fifth Circuit's reasoning, the defenses to the agreements would be useless, as they could only be asserted against parties -- the FDIC, the FSLIC, and the failed bank -- who had already assigned away the right to enforce the agreements.

It is this holding that contravenes *O'Melveny & Myers v. FDIC*, ___ U.S. ___, 114 S.Ct. 2048, 2054 (1994). Under *O'Melveny*, the FDIC, acting as a failed bank's receiver, is subject to state-law defenses to the same extent as was the assignor-failed bank under state law. *See id.* at 2053, 2054. *O'Melveny* is consistent with state law holding that an assignee may receive no greater rights than those held by its assignor. *See* Pet. 26 (citing cases). In contrast, under the Fifth Circuit's holding, the assignee Bank is not subject to defenses that would have been good against the assignors (the failed

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[5]Indeed, the waiver agreement on which the Fifth Circuit expressly rests its holding plainly reserved the Defendants' right to assert defenses against the Bank based on the actions of the failed bank and its receivers:

> "[T]he Borrower and the . . . Guarantors each waives and releases any and all offsets, claims, defenses, or counterclaims of any nature whatsoever which any of them has or may have against [FGB], ***provided, however, that*** the Borrower and the undersigned Guarantors *reserve any defense or offset* (but not any other claims or rights) with respect to the enforceability of the loan Documents now held by [FGB] *arising from the acts or omissions of the Closed Association or of the FSLIC, acting in its capacity as receiver of the Closed Association, or any successor of the FSLIC acting in that same capacity. . . .*"

Pet. A16 (quoting Letter from First Gibraltar to Defendants at 3 (dated September 25, 1989)) (emphasis modified).

bank, the FSLIC, and the FDIC). The Fifth Circuit's opinion therefore conflicts with *O'Melveny*.[6]

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[6]The FDIC suggests in a footnote that the Defendants have no remaining claim in this case even if the Defendants did not waive their defenses against the Bank. FDIC Br. 11 n.7. The FDIC argues that the Defendants do not challenge the district court's finding that there was no default by the failed bank between the reinstatement agreement on November 3, 1988, and the failed bank's collapse on December 27, 1988. *Id.* Defendants were not required to challenge this finding, however, because the Fifth Circuit did not rely on it and, indeed, modified it. Unlike the district court, the Fifth Circuit did not hold that the failed bank had not defaulted; to the contrary, the Court of Appeals recognized the continuing viability of the Defendants' defenses that arose "during the period from November 4, 1988 to December 28, 1988, the date that FGB acquired [the failed bank's] assets." Pet. A16. The Fifth Circuit rejected the Defendants' defenses for a different reason: it held that the Defendants could not assert those defenses against the Bank, but rather could assert them only against the failed bank, the FSLIC, or the receiver. *Id.* This was the Fifth Circuit's holding as to the validity the Defendants' defenses, and the Defendants have challenged this holding in their Petition. *See* Pet. 25-26.

In any event, the Fifth Circuit correctly refused to follow the district court's holding that the failed bank did not default between the reinstatement agreement on November 3, 1988, and the failed bank's collapse. As shown in the Petition, the bank's collapse *was* the default, because at that time the bank and its receiver unequivocally and irrevocably repudiated its obligations to continue funding the Defendants' project. *See* Pet. 5.

Furthermore, the district court's suggestion that the Defendants defaulted on their notes has no support in the summary judgment record. Under the terms of the loan agreements, any alleged failure by Defendants to make an interest payment by December 1, 1988, did not constitute a default; instead, it constituted only an event of default. An "event of default" could not become a "default" under the loan agreement until written notice was given and Defendants were given ten calendar days to cure the alleged event of default. R. 1968. Thus, under the loan agreements, no breach exists until the Defendants fail to cure an event of default after receiving written notice. The Plaintiffs' own evidence confirms that the notice required to convert this alleged "event of default" into a "default" (*i.e.* a breach of contract) did not occur until April 18,

IV. Conclusion

Because the Court of Appeals' judgment conflicts with this Court's Article III jurisprudence, allows the FDIC to manipulate federal jurisdiction, and contravenes this Court's holding in *O'Melveny & Myers v. FDIC*, ___ U.S. ___, 114 S.Ct. 2048, 2054 (1994), the Defendants' petition for writ of certiorari should be granted.

Respectfully submitted,

By: /s/

Robin C. Gibbs
TBA No. 07853000
1100 Louisiana, Suite 5300
Houston, Texas 77002
Telephone: (713) 650-8805
Facsimile: (713) 750-0903

ATTORNEY OF RECORD FOR DEFENDANTS GARY L. BRADLEY, JAMES D. GRESSETT, AND CIRCLE C DEVELOPMENT CORPORATION

1989, at the earliest. *See* R. 3192. That was nearly four months after the failed bank had *wholly repudiated* the loan agreements by closing its doors and assigning away all of its assets. The repudiation having long proceeded the alleged default by Defendants, Defendants' performance was excused. A material issue of fact also existed as to whether the alleged lateness of the interest payment was waived by the Bank. *See* Corrected Brief of Appellants/Cross-Appellees (filed in the Fifth Circuit on October 31, 1995) (citing evidence).

OF COUNSEL:

GIBBS & BRUNS, L.L.P.
Phillip T. Bruns
TBA No. 03258500
Paul J. Dobrowski
TBA No. 05927100
Barrett H. Reasoner
TBA No. 16641980
Jennifer Horan Greer
TBA No. 00785611
1100 Louisiana, Suite 5300
Houston, Texas 77002
Telephone No.: (713) 650-8805
Facsimile No.: (713) 750-0903